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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HARLAN D. VANDER ZEE,
PETITIONER

VS

JANET RENO, STONE OAK NATIONAL BANK,
STONE OAK BANKSHARES, INC
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
ET AL
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether A Conflict In The Circuits Is Created By the Fifth Circuit's Affirming The District Judge's Substitution of His Own Judgment as to A Finding Of The Fact Contained In The Jury Verdict, That The Element of Consideration Existed, Supporting the Finding of A Binding Contract?

Where:

A. The Evidence Of Consideration For the Contract Was In fact Presented To The Jury;

B. Consideration Was Implicitly Found To Exist By the Jury in Its Verdict Finding A Binding Contract;

C. The Adverse Party Admitted In Oral Argument Before the Fifth Circuit That Consideration In Fact Flowed To the Bank.

II. Whether Immune Employees of the Federal Government Can Be Deemed to Be One of the Two "Persons" furnishing the required element for a Civil Conspiracy of "two or more persons", Even Though Those Federal Employees Were Held to Be Immune From Prosecution By the District Court?

III. Whether This Court Should Exercise Its Supervisory Power To Correct A Massive Departure From Standards Of Justice Resulting In A Totally Innocent Citizen Being Maliciously and Disgracefully Victimized By the United States Department of Justice, Using The Court System As A Tool To Accomplish That Base Purpose, And Being Denied All Relief By the Courts?

IV. Whether Substantial Evidence, Acquired Only After Dismissal Of all

Charges Against the Government and Its Agents, Absolutely Required, As A Bare Minimum, The Trial Judge To Reconsider The Earlier "Final Dismissal" As To Conspiracy Claims, and/or To Supplement the Record Of That Part Of The Case Then On Appeal

Where:

A. The New Evidence Was Determinative Of All Issues Previously Litigated And Dismissed by the Court;

B. The United States Department of Justice (DOJ) Had Usurped The Authority of The Banking Regulators And Acted To Deprive the Petitioner of His Property and Liberty Rights and Concealed That Fact From the Court and the Petitioner;

C. The DOJ Employees Violated Clearly Established Constitutional Rights of Property, Liberty and Due Process protection of Those Interests, Acted With

Malice and "Disgraceful Vengeance" (See-Finding of The District Judge-Appendix K-8,9) In Meting Out That Extra-Judicial Punishment, Taking Property and Liberty of the Petitioner, and Destroying Petitioner's Livelihood as a 30 + Year Banking Executive.

D. A Subsequent Freedom of Information Case Disclosed That There Never Had Been A Scintilla of Evidence Of Any Wrongdoing By the Petitioner and That This Fact Was At All Times Well Known To The United States Department of Justice and the Co-Conspirator Bank.

LIST OF PARTIES

The Petitioner is:

1. Harlan D. Vander Zee

The Respondents are:

1. The Honorable Janet Reno, Attorney General of the United States of America.

2. Stone Oak National Bank and its successors in interest.

3. Stone Oak Bankshares, Inc. and its successors in interest.

4. Fidelity and Deposit Company of Maryland. No issue is presented upon this appeal affecting this Appellee in the prior litigation except in the event of re-institution of all issues involving new discovery of the conspiracy as initially alleged.

5. In the event the Constitutional arguments of the Petitioner are upheld,

additional presently unknown parties will be several employees of the United States Department of Justice in their individual capacities. One of these, whose name is presently known, is expected to be Jack C. Frels, Esq.

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IN THE SUPREME COURT
OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Harlan D. Vander Zee respectfully prays that a writ of certiorari issue to review the judgment and related opinion of the United States Court of Appeals for the Fifth Circuit, entered on May 19th, 1997, which appears at the Appendix pages A1 to A 4, and to review the judgments and opinions of the District Court, which opinions and judgments were affirmed in all respects upon appeal, including denial of post trial motions.

JUDGMENTS AND OPINIONS BELOW:

The judgments appealed from are voluminous. To make them more concise and clear, all Judgments and Orders appealed from have been summarized in the index following this petition. A verbatim copy of each Judgment, Order and Opinion appears following this Petition.

JURISDICTIONAL STATEMENT

(i) The Orders and Judgments sought to be reviewed are:

Judgment of the United States Court

of Appeals for the Fifth Circuit denying Petitioners petition entered on May 19th, 1997. The Supreme Court has jurisdiction to review that Judgment pursuant to 28 U.S.C. §§ 1254 and 2106. The several Orders of the United States District Court which were affirmed by the Fifth Circuit Decision and the Post Judgment Denial of Petitioner's Motion To Supplement the Record on Appeal and For Reconsideration.

STATUTES

No statutes are determinative of the result in this case.

STATEMENT OF THE CASE

The Petitioner, Harlan D. Vander Zee filed suit alleging constitutional violations of Fifth Amendment Due Process rights and deprivation of property and liberty rights under the Bivens[1] doctrine, alleging constitutional tort violations. He requested injunctive and declaratory[2]

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[1] Bivens v. Seven Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

[2] Of particular interest are several iterations of secret "settlement

relief against the United States of America and several of its employees, United States Department of Justice attorneys. He joined the Stone Oak National Bank (the Bank), and Fidelity and Deposit Company of Maryland (F&D) as Defendants alleging civil conspiracy and breaches of contract. He later filed a separate Federal Tort Claims Action against the Federal Employees. All Federal Charges were dismissed, the constitutional torts primarily on immunity grounds, the Federal Tort Claims Act violations on exceptions to the waiver of liability by the Federal Government. The Court never allowed any discovery against government employees. All civil conspiracy charges against the Bank were dismissed on the grounds that government immunity left no co-conspirators to

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agreements" to which Vander Zee was never a party, between the Bank and the DOJ, whereby Vander Zee was fired, denied attorney's fees for the defense of false criminal charges of money laundering and de facto barred from banking for all time.

conspire with the bank.

While the appeals were on-going in the Fifth Circuit Court of appeals, the jury trial of the remainder of the case against the Bank for alleged breaches of contract, came on for trial. Vander Zee prevailed with the jury finding for Vander Zee on all remaining counts and awarding damages for breaches of contract in the total sum of $293,750.

One peculiar event occurred during the trial. One witness, a government chief bank examiner, Jesse Wong, disclosed for the first time that the cover story accepted by Vander Zee up to that time as true[3], and contained in his pleadings, was

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[3] The false cover story was that the Bank Regulators, the Office of the Comptroller of the Currency was the agency that had Demanded Vander Zee's Resignation. Vander Zee, being told that falsehood by his Bank Colleagues, Accepted That Fact as true and included it in his pleadings. The judge also relied upon that false fact. See Appendix, Pg. K-4, ¶ 2. The United States Government failed to correct the false and misleading material fact, and relied upon it in moving to dismiss the case, which dismissal was granted. Thus, the Department of Justice

in fact false, and that, in fact the Bank Regulators had had no part in the civil conspiracy to harm Vander Zee. That surprising testimony left, as the sole culprits, persons at the United States Department of Justice, had no authority to regulate banks and banking.

What those unauthorized DOJ attorneys did was to first coerce the bank to fire Vander Zee, falsely stating that the bank regulators[4] required his resignation. They then required the bank to cut-off Vander Zee's contractually promised and legally required legal defense funds. Then, by the prohibitions contained in the onerous settlement agreement, the DOJ required the bank to renege on the banks contractual promises to "stand behind him". Testimony at trial by the Bank President proved that meant to pay his salary and fees while he

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acted to perpetuate the fraud upon the Petitioner and renewed that fraud when it opposed Petitioner's later motion to supplement the record on appeal.

[4] The Office of the Comptroller of the Currency were the Congressionally authorized regulatory agency, not the DOJ.

was defending the false charges of money laundering.

Upon learning at trial of the correct facts as to who had harmed him, Vander Zee moved to have this evidence forwarded via a "supplement to the appellate record" pursuant to F.R. App. P. 11(e) first made in the District Court. That motion was denied, (Appendix D-1 to D-4) and also denied by the Fifth Circuit.

Without that key evidence before it, the Fifth Circuit Panels ruled that Vander Zee had failed to make out all of the elements of a case under Bivens. With that evidence, the acts complained about would have met the "violation of clearly established law" standard Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), for denying the claims of governmental immunity.

Following the jury trial, the Defendant bank filed a motion for judgment N.O.V. (more properly as re-named a judgment as a matter of law). The District Court granted the motion as to

the breaches of contract as found by the jury, finding, in contravention of the jury verdict that a binding contract existed.

The evidence relied upon by the jury as to the existence of consideration was substantial. Without Vander Zee's forced resignation the bank could not have settled the case with the DOJ, whereby about a million dollars in seized security was returned to the bank. Further, the attorney for the bank admitted that the resignation of Vander Zee was a necessary part of the bank's settlement with the DOJ. The documents of record in the trial also showed that fact.

The Fifth Circuit affirmed in all respects (Appendix A-1 to A-4) the District Court's rulings.

STATEMENT OF FACTS:

When this case started, Vander Zee was a successful bank president and executive vice president, with over 30 years experience. Vander Zee has never violated any law, always lived an honest

and exemplary life in all ways[5].

Nevertheless, by the time the events described in this petition were completed, he was ruined, financially, in his profession from which he has been permanently barred, as a matter of reputation for honesty and integrity. He had spent his life savings on attorney's fees to vindicate himself from false,

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[5] Throughout the seven year history of this case and related cases, not a scintilla of evidence of culpability by Vander Zee in the drug money laundering scheme has been presented by any person. The United States District Judge who tried the money laundering case stated upon the dismissal of the case against Vander Zee, that all the government has proved is that [Vander Zee] did only what a prudent banker would do.

Vander Zee has recently completed a freedom of information case before Judge Sparks, Western District of Texas, Vander Zee vs United States of America, et al., Case No. A 95-CA-366 SS. Not a scintilla of evidence of wrongdoing was produced in that exhaustive investigation either. The government, by non-production of anything of substance in that case, and in stating to the Court that everything has been produced, has verified that nothing of substance ever existed derogatory to Vander Zee.

malicious, reckless, vindictive and vicious attacks by employees of the United States Department of Justice (DOJ) who had no authority to regulate banks or banking personnel matters[6].

Although the jury returned a verdict for Vander Zee in all of the remaining respects, the judge overruled the jury's finding of a valid contract and breach thereof. The District Judge relied upon his own findings of fact that there was no consideration flowing from Vander Zee at the time of his coerced resignation. The

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[6] The District Judge, while awarding essentially no relief, did recognize the despicable acts, overreaching, and misdeeds of the DOJ attorneys. See Order, June 6, 1994, Appendix K-8:

> "It appears that the U.S. Attorneys acted with disgraceful vengeance in drafting the settlement agreement. After failing to present sufficient evidence of Vander Zee's guilt in the proper forum, the lawyers and the U.S. Attorney's Office evidently sought to punish or denigrate Vander Zee in a forum where he could not participate, the civil forfeiture action involving Salinas' Assets".

judge further reduced the award to Vander Zee by refusing to award attorney's fees and costs as set by Texas statute, citing the refusal to accept the $100,000 offer of judgment, which of course had been greatly exceeded (3 times) by the jury award, if it stood intact.

The jury verdict found that the Bank had violated its contractual promises to Vander Zee to:

a. pay his criminal defense attorney's fees, and awarded the sum of $43,750. and;

b. re-employ him at Stone Oak National Bank, and awarded him the sums of $200,000 for past earnings lost, and $50,000 for the value of future earnings lost, or a total of $293,750.00.

In post trial motions the Trial Judge granted the Defendant's motion for judgment N.O.V. citing the lack of consideration for the contract to re-employ. The judge allowed the attorney's fees award to stand.

The jury determined (see verdict, Appendix E-4) from the evidence and the

judge's detailed instructions which included instruction on the element of consideration, and to which no objection was lodged, what those contract terms were, but the judge simply redetermined them striking the award on inappropriate, inapplicable and hyper technical grounds of lack of consideration, essentially overruling the jury finding of fact and mis-labeling the redetermination of fact as a question of law.

Vander Zee's pleadings relied upon the false cover story planted by the bank and the DOJ that the Bank Regulators had required the firing of Vander Zee. This error in Vander Zee's factual allegations was brought about by the process of bank officials, telling Vander Zee falsehoods as to the identity of who was demanding his resignation.

This false cover story as accepted as truth in Vander Zee's pleadings was, at least, partially determinative in the subsequent dismissal of all claims against government employees of the DOJ in that Vander Zee had failed to allege (and as

affirmed by the Fifth Circuit) that the specific DOJ employees sued had actually caused the firing.

Just prior to trial, the conspiracy claim against the bank was dismissed on the grounds that the theory of a conspiracy required that co-conspirators exist, and found that the government and/or its employees, being immune, did not satisfy that requirement of two or more separate persons for civil conspiracy purposes.

The sole remaining claims, the claims for breach of two separate contracts against the Bank, one to pay attorney's fees as to the criminal defense, and the second for breach of the contract to re-employ in exchange for an involuntary "resignation" coerced by the government, came on for trial as to the three remaining issues. These three issues were:

1. Was there a contract to pay on-going salary in exchange for his resignation.
2. Was there a contract to re-hire him after acquittal of the criminal charges in

exchange for his resignation.

3. Was there a contract to pay his criminal defense fees.

Vander Zee in fact had been exonerated by a finding of "not guilty" by a directed verdict upon the conclusion of the government's case in the criminal jury trial, but the bank in the meantime had signed a settlement agreement with the department of justice prohibiting the rehiring of Vander Zee by the Bank or paying any of his criminal defense fees in exchange for the DOJ's release of about one million dollars in confiscated certificates of deposit owned by Salinas, but held by the bank as security for loans on Salinas's real property which was also seized by the government.

Thus, the acts committed by the bank were in fact coerced by the very real threat of closing the bank.

The bank regulators, the Office of the Comptroller of the Treasury (OCC), affirmatively refused to participate in that onerous settlement agreement which is still in effect and barring Vander Zee

from banking even today[7]. Upon the signing of the settlement agreement, the DOJ announced and caused to be published nationwide that the civil settlement showed the culpability of Vander Zee and published that false information nationwide. That act, of course was the final nail in the coffin of Vander Zee's career in banking.

The jury found that the bank had breached that agreement to him and was liable for damages resulting from the breach.

Vander Zee's allegations that the bank was liable under its own by-laws and Texas law for indemnification for attorney's fees for his criminal defense.

The jury found the bank had breached

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[7] The Fifth Circuit, in Vander Zee I, Vander Zee v. Reno, et al, Fifth Circuit Case no 94-50702, 73 f. 3d 1365, (5th Cir. 1996) affirmed the Judgment of the U.S. District Court. However it made the unusual suggestion in F/N 8 that Vander Zee could still obtain redress by intervention in the civil forfeiture case, over which the U.S. District Court obtained continuing jurisdiction. This intervention is now in process.

that agreement also.

The jury found the contracts existed, and rendered a jury verdict for Vander Zee totalling $293,750. plus interest. Attorneys fees and costs were automatically to be added as a matter of Texas statute.

The Court, citing Vander Zee's failure to take the offer of judgement, and exceeding his discretion and power to redetermine a jury's finding of fact after the verdict, overruled the verdict, reduced the award to the amount of $43,750, and denied all claims as to the breaches of the re-employment contract and statutory attorney's fees awards as a consequence of Vander Zee's refusal to settle, as strongly suggested by the District Judge.

When, at the trial on the breach of contract claims, the only remaining "live" charges, the clever cover story of the DOJ unraveled, it exposed for the first time the fact that those DOJ employees were in fact the culprits, it was too late for Vander Zee, using normal pleading

amendment procedures to do anything, either in the District Court or upon appeal.

This was because the cases against the DOJ and the offending DOJ employees had already been dismissed and were then on appeal to the Fifth Circuit. More importantly, the Fifth Circuit record did not include that key and determinative information. Vander Zee, realized how important this newly discovered information was as to the issues then on appeal, and immediately filed a motion for supplementing the record on appeal to the Fifth Circuit.

Vander Zee appealed to the Fifth Circuit. That Court affirmed all of the District Court's orders. Vander Zee submits that the District Court and the Court of Appeals violated standards clearly established in other circuits as to the lack of power of a federal judge to amend or cancel a jury's findings of fact in a Judgment as a matter of law.

Vander Zee also submits that the District Judge abused his discretion by

failing to reconsider newly discovered clear and convincing proof of valid constitutional and civil conspiracy violations. Those facts, i.e. that the Department of Justice Attorneys, not the bank regulators, had coerced the resignation and punished Vander Zee by de facto barring him from banking for all time, were concealed from the court and Vander Zee by all defendants until after the conspiracy and constitutional charges against the government and the other defendants had been dismissed from the case.

This failure to reconsider by the trial judge violated the intent and operation of Federal Rule of Procedure 60(b), as a fraud on the court, a failure to apprise the Court of facts uniquely available to the DOJ, and under these circumstances required the invocation of F. R. App. P. 11(e).

Vander Zee submits that it was a gross abuse of discretion for the District Court not to reconsider the determinative effect of those new facts upon the

previously dismissed charges of constitutional violations and civil conspiracy. Essentially, the Court turned a blind eye to the malfunctions and outright dishonest actions of the DOJ.

As a consequence of all of the above, the only relief Vander Zee had been awarded for the massive damage to him, his family, and his career is a pittance award of a part of his attorneys fees which were allowed by the District Judge. The essentially fraudulent actions of the DOJ have been validated by the Courts. The Court system simply did not work in this case.

REASONS FOR GRANTING THE WRIT

I. A Conflict In The Circuits Is Created By the District Judge's Substitution of His Judgment as to A Finding Of The Fact Subsumed In The Jury Verdict That Consideration Existed For A Contract To Continue To Pay Salary and Re-Employ the Petitioner:

At the trial of Vander Zee's breach of contract claims, a large set of conflicting facts were presented to the

jury, along with the correct and unchallenged jury instructions as to the law on determination of whether or not a contract existed, including the element of consideration. Documentary evidence was presented that supported the existence of consideration in the form of an aid in the bank staying in business, resulting at least partially from the benefit to the bank from the coerced resignation of the Petitioner.

The jury spoke and found in its verdict that the contract, including the element of consideration existed.

But the District Judge had his own idea of the facts. The Judge exceeded his power in this case, and his error was affirmed by the Fifth Circuit, creating a conflict on the power of a District Judge to grant a Judgment As A Matter Of Law where facts exist in support of the jury verdict.

A Motion for Judgment as a Matter of Law presents only questions of law University Marketing & Consulting, Inc v. Hartford Life and Accid. Ins. Co., 413 F

Supp 1250 (E D Pa 1976); Crusade v. Capital Transit Co (Mun. Ct. App. Dist. of Col, 63 A 2d 878 (1949). The trial Court is not free to weigh evidence or pass on credibility of witnesses Song v. Ives Laboratories,, Inc. 957 F. 2d 1041 (2d Cir NY 1992).

If the court decides an issue after it has been properly submitted to a jury, as done here, it may deprive the non-moving party of rights under the 7th amendment to a jury trial on the facts Gallager v. Wilton Enterprises, Inc. 962 F 2d 120 (1st Cir. Mass 1992).

The trial court must assume as true all facts which the prevailing party's evidence tended to prove University Marketing, supra, the facts most advantageous to him, with all inferences favorable to him Zegan v. Central R. Co., 266 F 2d 101, 77 ALR 2d 768 (3rd Cir Pa 1959), Brown V. Moore, 247 F. 2d 711, Cert Den 355 U.S. 882, 2 Led 2d 112, 78 S Ct 148 (3rd Cir Pa 1957). The question presented on a motion for judgment under rule 50(b) is the same as under a motion

for Judgment N.O.V. renamed Judgment as a matter of law, that is whether the evidence is sufficient as a matter of law to sustain the verdict for the other party.

The judge impermissibly substituted his judgment as to the existence or non-existence of consideration for that of the jury.

The other supporting evidence for the existence of consideration included substantial evidence of benefit to the Bank from Vander Zee's act in acceding to the coerced resignation, and substantial detriment to Vander Zee from so doing. For example, he might not be here destroyed as a viable wage earner as a bank executive vice president, had he insisted upon the hearing to which he was entitled as a result of the resignation coerced purported by the bank regulators. As presented to the jury, in reality the bank regulators were not involved in the coercion, the coercion was done entirely by the Department of Justice under a covert cover story that the bank

regulators required that resignation.

It is simply false to find as the judge did in contravention of the jury verdict, that no consideration at all was contained in the voluminous documentary and testamentary evidence.

What the District Judge did was to substitute his judgment for that of the jury, as contained in the jury verdict. That is precisely what the other circuits prohibit in the cases cited above.

Moreover, the attorney for the bank admitted to the Fifth Circuit panel in oral argument that the bank had in fact benefitted from Vander Zee's acceptance of the terms of the coerced resignation, as found by the jury.

Therefore, the District Judge and the Fifth Circuit panel have violated the standards for granting a Judgment as a matter of Law as set out in other circuits.

It follows that Certiorari should be granted to prohibit the rule of law, so clearly and correctly established in other circuits from becoming a conflict in the

Fifth Circuit.

II. The District Court's Finding, That Immune Employees of the Federal Government Can Not Be Deemed to Be One of the Two "Persons" furnishing the "more than one person" element required to find a Civil Conspiracy of Is An Extreme Departure From the Standards Set By This Court; the Ramifications Of That Theory Are Horrifying and Inimical To Our Society:

The District Judge dismissed, just before the jury trial all civil conspiracy charges made by the Petitioner against the bank. The Judge used the logic that two or more conspirators are required for a civil conspiracy and neither the Federal Government, being immune, nor its employees, here, Department of Justice Attorneys, being immune, can furnish the required element of the other party.

Then, the Judge ruled, since no other party was available with which to conspire, it was impossible as a matter of law to find the bank a participant in the conspiracy.

This logic is false and faulty, even

though affirmed by the Fifth Circuit Panel. Many times in the history of this country have high government employees been charged and held accountable for conspiracies or tortious conduct. Most notably recently are the following. But here, the logic goes even further, the Court has essentially ruled that if any government person is involved in whatever act, and another assists him, the immunity spills over to the non-government person. That logic if followed to the end could spell the end of morality and justice in this country. This Court should exercise its supervisory power to correct this faulty reasoning before it gets started. Cases finding government employees responsible for mere error include, Westfall V. Erwin, 484 U.S. 292, 108 S. Ct 580, 98 L. Ed. 2d 619 (1988) finding that inadvertent tortious conduct beyond the scope of employment is actionable; the Pentagon Whistle Blower cases, Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2890, 73 LE 2d 349 (1982); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct 2727, 73 LE 2d 396

(1982), found high government officials liable for damages for civil conspiracy.

Here, the trial judge, without citing any authority, for it is believed that none exists, chose to allow the government conspirators, not only to be held immune themselves, but to protect from accountability the persons, not immune, with which they conspired to deprive the Petitioner of his constitutionally guaranteed civil liberties and property.

This important violation of the principles of law even as set down in a case in the Fifth Circuit, See Richardson V. Fleming, 651 F. 2d 366 (5th Cir. 1981) is sufficient standing alone to grant certiorari in this case. This ruling by its extension and implications is dangerous and outrageous for it gives license to government employees to conspire with third parties and for the third parties to thereby be placed outside of any accountability at law at all. That is certainly not what Bivens, supra, and Westfall, supra, contemplate. Therefore, this ruling, affirmed by the Fifth

Circuit, is directly in contravention with the teachings of this Court. Certiorari should be granted to review this aspect of this case.

III. Under Our System Of Justice, The Stone Oak National Bank (the Bank) Acting With Prosecuting Attorneys of The United States Department of Justice Violated Clearly Established Principles of Constitutional Due Process and Liberty Rights In Conspiring and Meting Out Extra-Judicial Punishment to The Utterly Innocent Petitioner; This Court Should Exercise Its Supervisory Power To Correct A Massive Departure From Standards Of Justice By the United States Department of Justice:

Under our system of justice, only the Courts have the authority to punish a citizen. But here, massive punishment was done to Vander Zee under the cover of an agreement between the Bank and the Department of Justice. The Fifth Circuit, in an unusual opinion has suggested and authorized a return to the Trial Court wherein the onerous agreement was filed to

obtain relief. The Petitioner has done that and respectfully requests that this Court grant Certiorari to exercise its supervisory power over that Court to bring this case back into the realm of reasonableness as to adherence to constitutional standards which have, in this case so far departed far from the standards of constitutional actions required of the department of justice and the district courts.

For this reason certiorari also should be granted.

IV. Substantial Evidence, Acquired Only After Dismissal Of all Charges Against the Government and Its Agents, Under Principles of Fifth Amendment Due Process and F.R.Civ. P. 60(b), Absolutely Required The Trial Judge To Reconsider The Earlier "Final Dismissal" Or, At the Very Least To Supplement the Record Of The Part Of The Case Then On Appeal:

The New Evidence, acquired at trial of other issues, showed that:

A. The United States Department of Justice (DOJ) had usurped the authority and acted

in the name of the banking regulators to deprive the Petitioner of his property and liberty rights;

B. The prior dismissal would not have occurred had the concealed facts been then known to the court for the DOJ had no such authority to so act; and those acts effectively destroyed the business life of the Petitioner;

C. The DOJ employees violated clearly established Constitutional Rights of Property, Liberty and Due Process, interests they are charged with protecting not destroying. The DOJ attorneys, after their prosecution was done, and over by six months acted with malice and "Disgraceful Vengeance" (See-Finding of The District Judge-Appendix K-8,9) in meting out that extra-judicial punishment, taking his property, requiring the bank to fire him and his liberty, barring him from banking forever. Moreover, they took his good name and destroyed his reputation for honesty and integrity.

D. A subsequent Freedom of Information Case resulted in the utter lack of any

derogatory information held by the Government agencies. Only one clear message was conveyed. The District Judge had it right when he ruled that the actions were disgraceful attempts to harm Vander Zee simply because the DOJ had failed to prove its case against him. This of course, DOJ knew all the time, for no evidence of any wrongdoing ever existed. There Never Had Been A Scintilla of Evidence Of Wrongdoing By the Petitioner and That This Fact Was At All Times Well Known To The United States Department of Justice.

This massive departure from the standards set for the creation of an atmosphere of trust and confidence of the law abiding Citizens of this Country should be addressed by this Court and the power of this Court used to insure that this type of abuse does not ever happen again. No act of the Court can be more important.

For this reason also, Certiorari should be granted.

CONCLUSION

In this case the system of justice, to date, has utterly failed. The Petitioner Harlan D. Vander Zee has and always will lead an exemplary life. Yet our own Department of Justice destroyed him, for base, vindictive, vengeful and dishonorable reasons. This departure of the law enforcement arm of our government is sufficiently egregious, and sufficiently unprincipled to expect that the Court system would offer some redress. But it has, to date, not done so despite a Herculean effort by the Petitioner to right the wrongs done him by his own government.

What possibly could be more important for this Court to address than a breakdown or deficiency in the legal system allowing employees of the United States Department of Justice to pervert the system, including the Court system to their own purposes, without fear of accountability for civil conspiracies conducted.

For all of the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50795

HARLAN D. VANDER ZEE,
Plaintiff-Appellant,
versus
STONE OAK BANKSHARES, INC. ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas
(93-CV-184)

U.S. Court of Appeals
FILED
MAY 19,1997
Charles R. Fulbruge, III, Clerk

Before DUHE, BENAVIDES, AND STEWART, Circuit Judges.

PER CURRIAM:*

Harlan Vander Zee ("Vander Zee") filed suit against Stone Oak Bankshares, Inc. and Stone Oak National Bank ("Stone

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Oak"), and their liability carrier, Fidelity & Deposit Co. of Maryland ("F&D"), for various claims including breach of contract, conspiracy and intentional infliction of emotional distress related to Vander Zee's indictment on money laundering charges while he was employed as an executive vice president of Stone Oak National Bank in San Antonio, Texas. Among the claims Vander Zee asserted, were claims that Stone Oak breached an oral contract by not rehiring him after the money laundering litigation was over, and that Stone Oak breached a contract to pay his criminal attorney's fees incurred defending the money laundering charges. Before the case was submitted to the jury, the district court granted Stone Oak's and F & D's motion for summary judgment and motion for

directed verdict, dismissing the conspiracy claims and intentional infliction of emotional distress claims. The breach of contract claims were submitted to a jury, which found that Stone Oak had breached contractual promises to Vander Zee and proximately caused him $293,750 in damages. Stone Oak moved for a judgment N.O.V.[1] The court granted the motion in part, entering a take-nothing verdict on Vander Zee's re-employment claim and his claim for attorney's fees in bringing this action. The court awarded Vander Zee $43,750 in breach of contract damages on his criminal

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[1] The Court is aware that pursuant to a 1991 amendment, a judgment N.O.V. is now renamed as a judgment as a matter of law, but for purposes of consistency we utilize the terms used by the parties. See Fed.R.Civ.P.50.

attorney's fees claim, plus pre-judgment and post-judgment interest.

On appeal, Vander Zee makes several arguments, some of which are not relevant to this appeal. The issues pertinent to this appeal are Vander Zee's claims that the district court erred in granting summary judgment and a directed verdict on the conspiracy and intentional infliction of emotional distress claims, and erred in entering a judgment N.O.V. on the contract claims. After carefully reviewing the briefs and the record, we affirm for the reasons stated by the district court in its memorandum order. See Vander Zee v. Stone Oak National Bank, et al., No. A-94-CA-020-SS (W.D.Tex. Oct. 5, 1995).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO. A 94 CA 020 SS

HARLAN D. VANDER ZEE,

VS.

STONE OAK NATIONAL BANK,
STONE OAK BANKSHARES, INC., and
FIDELITY & DEPOSIT COMPANY OF MARYLAND

JUDGMENT

BE IT REMEMBERED on the 11th day of September 1995 the above-styled cause was called for jury selection and trial. The Court having granted summary judgment in favor of Fidelity & Deposit Company of Maryland on 29th day of May 1995, it was not present at trial. On the 13th day of September, after both sides had closed, the case was submitted to the jury. The jury returned a verdict as follows:

Question One: No

Question Two: A: Yes; B: Yes

Question Three: A: Yes; B. Yes

Question Four: $43,750.00

Question Five: A: $200,000.00;

B: $50,000.00

Defendants Stone Oak National Bank and Stone Oak Bankshares, Inc. filed a motion for judgment summary N.O.V. and Plaintiff filed a motion for judgment on the jury's verdict. For the reasons stated in the Court's memorandum order, having considered the pleadings on file in this case, the evidence adduced at trial, the post-verdict motions of the parties, and the relevant case law now enters the following judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff, Harlan D. Vander Zee, shall TAKE NOTHING by his causes of action

against Fidelity & Deposit Company of Maryland and that Fidelity & Deposit Company go hence this day without delay:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff, Harlan D. Vander Zee have and recover judgment against Defendant Stone Oak National Bank for the total sum of $43,750.00 plus interest in the amount of $18,135.97, post-judgment interest at the rate of ten-percent (10%) per annum until paid;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff, Harlan D. Vander Zee, TAKE NOTHING by his causes of action against Defendant Stone Oak Bankshares, Inc. and that Stone Oak Bankshares go hence without day; and

IT IS FINALLY ORDERED that each party shall absorb, his, her, or its own costs, including attorney's fees, in this case

and that execution shall issue on this judgment.

SIGNED and ENTERED on this 5th day of October 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO. A 94 CA 020 SS

HARLAN D. VANDER ZEE,

VS.

STONE OAK NATIONAL BANK, and
STONE OAK BANKSHARES, INC.

MEMORANDUM ORDER

Before the Court are Defendants' Motion for Judgment N.O.V. and Plaintiff's Motion for Judgment on the Jury's Verdict. Defendants Stone Oak National Bank and Stone Oak Bankshares, Inc. (collectively, "the bank") argue that the jury's finding of the existence of a contract between Plaintiff Vander Zee and the Defendants fails as a matter of law. Obviously, Plaintiff contests this view and seeks entry of judgment based on the jury's findings of contractual relationships.

In response to Question Two, the jury found that on or about May 20, 1990, Harlan Vander Zee and Stone Oak National Bank agreed that Stone Oak National Bank would pay attorneys' fees incurred in the defense of the criminal charges against Vander Zee and would re-employ Vander Zee upon completion of the criminal case against him. In response to Question Three, the jury found that Stone Oak National Bank had breached its agreements with Vander Zee.

Contract for Re-employment

By his testimony, Vander Zee established that in March 1990 he informed the bank that he was about to be indicted for money laundering. Vander Zee was told by Mr. Schumann, bank president, in the presence of the board of directors, that his job would be waiting for him when his

problems were over, that the bank would continue his salary and health benefits, and that the bank would pay the criminal attorney's fees he incurred defending himself. the bank did not request Vander Zee's resignation or any other action by Vander Zee at that time or in connection with those representations. Subsequently, on May 10, 1990, Harlan Vander Zee was indicted on charges of money laundering.

Vander Zee further testified that in May 1990 the bank requested his resignation and in connection with such request presented Vander Zee with the board resolution of May 16, 1990. (Exh. D-46 and P-39). The resolution stated only that the bank would pay Vander Zee's criminal attorneys' fees incurred and would continue health benefits for twelve months. Although initially refusing to

resign, Vander Zee tendered his resignation on May 22, 1990. (Exh. p-40).

Defendants argue that the representations made to Vander Zee at the March 1990 board meeting were gratuitous promises, unsupported by consideration, and therefore unenforceable. Plaintiff argues that his resignation, two months after the representations, was consideration for the March "offer." Plaintiff also argues that the Bank's promises were unilateral contracts, accepted by Vander Zee when he resigned.

It is undisputed in the record that the representations made to Vander Zee in March 1990 were merely gratuitous promises, requiring no consideration. *See Mason v. Babin,* 474 S.W.2d 809, 812 (Tex.Civ.App.--Waco 1971, writ ref'd n.r.e.). The bank did not ask for Vander

Zee's resignation in connection with the March promises or request any other type of promise or performance by Vander Zee. The bank simply expressed its intent to support Vander Zee through the criminal proceedings. Further, no consideration was ever given by Vander Zee for the Bank's promises. There is no evidence in the record to support Plaintiff's claim that his resignation was consideration for the March promises. *See, e.g.*, Exh. P-40.

Similarly, Plaintiff's argument for a unilateral contract is not supported by the record. "A contract is unilateral when one party furnishes no consideration of value to the other party and does not obligate itself to do anything which may result in injury to itself, or a benefit to the opposite party. This type of contract is completed by the promisee's

performing the act or acts called for, not by such promisee making any reciprocal promise or promises." *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 733 (Tex.App.--Corpus Christi 1994, writ denied)(citations omitted)(emphasis added). There is no evidence in the record that in March 1990, in connection with its statements of support, the bank requested any acts be performed by Vander Zee. The only evidence on this point is that Vander Zee thought the gratuitous promises would be performed when he reluctantly decided to resign on May 22, 1990, although he did not relate this belief to the bank in May 1990. Vander Zee's belief, not shared by or expressed to the bank, cannot form a unilateral contract binding the bank to re-employ him after the completion of the criminal proceedings.

Additionally and alternatively, even if the March statements could be construed as an offer, Plaintiff rejected that offer prior to his resignation. During cross-examination, Vander Zee admitted he initially refused to resign when requested to do so in May 1990. He acquiesced only after being told the Office of the Comptroller of the Currency (OCC) would issue a "cease and desist order" if he did not resign. By refusing to resign, Vander Zee rejected any offer that might have existed and could not subsequently accept such an offer. See Harris v. Mickel, 15 F.3d 428, 431 (5th Cir. 1994).

Vander Zee's resignation in May was not consideration for a contract entered into in March, nor was it action requested by the bank as part of any unilateral contract. Any contract formed in

connection with Vander Zee's resignation would have been limited to the Board's resolution of May 16, 1990. at the time the Bank requested Vander Zee's resignation, he was presented with a board resolution requesting the resignation and stating exactly what the bank would provide to Vander Zee--criminal defense costs and twelve months of health benefits.[1] Therefore, the only offer conceivably available for acceptance would be the May 16 resolution, without the prior statements about re-employment.

In sum, the Court finds as a matter of law Plaintiff had no contract requiring his re-employment by either Stone Oak National Bank or Stone Oak Bankshares,

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[1] In fact, the undisputed evidence at trial was that the bank paid Vander Zee's health benefits for eighteen months, rather than just the twelve months specified in the resolution.

Inc. The statements of support made by Mr. Schumann in March 1990 were nothing more that gratuitous promises. Without any evidence in the record of an enforceable agreement calling for Vander Zee's re-employment by either defendant, the Court must grant judgment in favor of Defendants on this point, notwithstanding the jury's answer to Question Two, part B.

Based on the Court's finding that no contract for re-employment existed, the jury's answers to Question Three, part B, and Question Five are also without support in the record. However, even if the Court were to find support for the existence of a contract and a breach of the contract, the jury's answer to Question Five was excessive and without support in the evidence. Under a contract for re-employment, Plaintiff would be entitled to

recover his wages only from February 1992, when he was acquitted, through September 1995, when the jury reached its verdict. After taking into consideration Plaintiff's mitigation of his damages, this would be an amount totaling $82,670.00. The Court would allow the $50,000.00 awarded as future damages to stand were there a contract for re-employment.

Criminal Defense Costs

Defendants also move for judgment not withstanding the verdict on the jury's finding of liability for Plaintiff's criminal defense attorneys' fees and costs. Defendants contend that any obligation it had to pay the attorneys' fees, contained in the May 16, 1990 resolution, expressly allowed the bank to discontinue fees at any time for any

reason. Additionally, Defendants contend that the bylaws of Stone Oak National Bank, which require payment of the attorneys' fees of a successful defense, is not binding on or enforceable against the bank. Plaintiff argues he is entitled to recover his criminal defense expenses pursuant to the bylaws of the bank and the bank holding company, under art.2.02-1(H) of the Texas Business Corporation Act, and/or pursuant to a contract between Vander Zee and the bank.

Taking up first the bylaws argument, the bylaws of Stone Oak National Bank and Stone Oak Bankshares each provide that the company "shall" indemnify an officer who prevails in a proceeding to which he is a party because he is an officer of the corporation. The disputed issue with regard to the bylaws is whether or not

they are binding upon the respective corporations. Defendants contend that because the bylaws may be changed by the boards of directors at any time, the indemnification provisions of the bylaws may not be enforced against them. Without elaboration, Plaintiff argues that the bylaws may support recovery of his criminal defense costs incurred.

As an initial matter, the only bylaws which potentially cover Plaintiff's criminal defense costs are those of Stone Oak National Bank. Each set of bylaws requires the officer's involvement in the proceedings to be as a result of his position as an officer of the corporation. It is not disputed that Plaintiff was indicted in connection with his position as an officer of Stone Oak National Bank. There is no evidence in the record that

the activities for which he was indicted involved his position as an officer of Stone Oak Bankshares, Inc.

In support of their argument, Defendants rely on *Butler v. Hide-a-Way Lake Club, Inc.* 730 S.W.2d 405, 410 (Tex.App.--Eastland 1987, writ ref'd n.r.e.), wherein the Court refused to invalidate an action that contravened the board's bylaws. Critical to the decision in Butler, however, was the defendant's status as a private, non-profit organization. *Id.* Obviously, neither defendant in this case is a non-profit organization and *Butler* provides little, if any, guidance.

In the absence of controlling authority, the Court finds that the terms of the Stone Oak National Bank's bylaws, the relevant provisions of which have

never been amended, are enforceable by a former officer and director of the corporation. The relevant bylaws state that reimbursement of an officer who is successful in his defense is "mandatory." These provisions constitute a legal obligation of the corporation under the facts of this case, and are enforceable by Vander Zee. The bylaws at issue were enacted for the benefit of the officers and directors and, although not expressly relied upon by Vander Zee, are binding upon the corporation.[2]

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[2] Although not raised by the Plaintiff, the analogy to a unilateral contract is much more persuasive as to this aspect of his case. One might argue the board had an open offer to reimburse the expenses of any officer or director who prevailed in proceedings against him. Vander Zee complied with the terms of the board's bylaws by prevailing. However, Vander Zee testified that he was not aware of the bylaws when he resigned. *See generally, Lone Star Steel Co. V. Scott,* 759 S.W.2d 144, 152 (Tex.App.--Texarkana

As a second ground for reimbursement of attorneys' fees, Plaintiff's argue entitlement pursuant to the Texas Business Corporation Act, art. 2.02-1(H). This argument is not persuasive. Article 2.01 of the Texas Business Corporation Act, entitled "Purposes," provides:

> B. No corporation may adopt this Act or be organized under this Act or obtain authority to transact business in this State under this Act:
>
> (4) If any one or more of its purposes is to operate any of the following:
>
> (a) Banks....

Tex.Bus.Corp.Act, Art.2.10(B)(4)(a) (Vernon's supp. 1995). This provision expressly prevents Plaintiff from relying on any part of the Texas Business Corporation Act as authority for reimbursement from either defendant, both

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1988, writ denied).

of whom were involved in banking operations.

Plaintiff's third argument for reimbursement of the outstanding criminal defense attorneys' fees is that a contract was formed in connection with Plaintiff's resignation from the bank. To the extent Plaintiff seeks to rely on the statements made at the March 1990 board meeting, no contract was formed for the reasons discussed previously regarding re-employment. Plaintiff also appears to rely on the board of directors' May 16, 1990 resolution (Exh. D-46 and P-39), which provided Stone Oak National Bank would "pay the reasonable cost of legal defense" and that "such payment shall be without condition." When relying on this resolution for its breach of contract action, Plaintiff fails to account for a

further provision of the resolution stating:

> Such payment shall be without consideration given by Harlan D. Vander Zee, and the payment of any portion of the cost of defense shall not be construed as any obligation on the part of Stone Oak National Bank to continue to make such payments, and Stone Oak National Bank, at any time, may elect in its sole and exclusive discretion, and without cause, to discontinue making such payments.

The unambiguous language of this resolution, given to Vander Zee at the time his resignation was requested, establishes that, as a matter of law, it may not serve as the basis for a breach of contract action. As a matter of law, the jury's finding, in Question Two, part A, of the existence of an agreement to pay criminal defense costs may not rest on either the March 1990 statements or the

May 16, 1990 resolution of Stone Oak National Bank.

Defendants also contend the Court should disregard the jury's answer to Question One, finding that the flat fee agreement between the bank and C.J. Muller, Vander Zee's criminal attorney, did not include representation for the second indictment. The agreement (Exhibits D-23 and D-24) states that the flat fee "would cover your representation of Mr. Vander Zee through final disposition of the case, whether by trial, dismissal, or otherwise." The agreement was reached before the first indictment had been dismissed.

The Court found the agreement to be ambiguous as to coverage for defense of the second indictment of Vander Zee based on the same conduct. After listening to

the evidence of the parties' intentions, the jury found the agreement did not include defense of the second indictment, which was not contemplated at the time the agreement was reached. The jury's answer to Question One is supported by evidence in the record and will not be disturbed by this Court.

Having determined that Plaintiff Vander Zee is entitled to reimbursement for the attorney's fees and costs he incurred under the bylaws of Stone Oak National Bank, the Court will enter judgment in favor of Plaintiff for $43,750.00, the amount of attorneys' fees the jury found to be outstanding.

Pre-Judgment Interest

Plaintiff argues he is entitled to pre-judgment interest on any award, beginning to accrue six months after October 17,

1990, when the bank indicted it would no longer pay his criminal defense costs. Under Texas law, Plaintiff is entitled to pre-judgment interest on any award he receives. See *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 152-154 (Tex.App.--Texarkana 1994, no writ). for an action such as this, pre-judgment interest begins to accrue six months following the injury and is compounded daily. *See Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co., Inc.*, 849 S.W.2d 894, 899-900 (Tex.App.--Austin 1993, no writ). Based on the contract between C.J. Muller and Stone Oak National Bank and the jury's answer to Question One, the Court finds that pre-judgment interest should begin to accrue six months following

Plaintiff's second indictment. Only once Plaintiff was re-indicted did the bank fail to pay his criminal defense expenses. The second indictment was filed on October 16, 1991, therefore interest begins to accrue on April 16, 1992. Pursuant to *Cavnar*, the rate of interest, 10% in this case, is provided by Tex.Rev.Civ.Stat.Ann. art. 5069-1.05 (Vernon's 1995 supp.).

Attorney's Fees for Collection

Plaintiff also seeks reimbursement for the attorneys' fees he incurred pursuing his claims against the bank. The Court would ordinarily award a plaintiff his or her costs of collection on an action to enforce the bylaws. However, in light of the record in this case, the Court cannot and will not award attorneys' fees incurred in this case to Mr. Vander Zee.

Early in this litigation the parties were made aware of this Court's rules requiring submission of written settlement offers, which the Court would review for reasonableness at the close of trial. This rule was reiterated to all parties long before the beginning of trial. Plaintiff was informed of the Court's procedure and reminded that costs and attorneys' fees would be awarded against any party who was not reasonable in his, her, or its settlement practices. Additionally, pursuant to Fed.R.Civ.P.68, Defendants Stone Oak National Bank and Stone Oak Bankshares, Inc. submitted and filed an offer of judgment in this case on June 2, 1995. Defendants offered judgment in the amount of $100,000.00. Although not required to be the rules, Defendants

renewed their offer to settle the case for $100,000.00 during trial.

In light of the complete absence of evidence to support a contract for re-employment, Plaintiff should have been aware that his only possible cause of action was for reimbursement of attorneys' fees under the bylaws of Stone Oak National Bank. Further, Plaintiff should have known that there was no way any court would award $56,500.00 in attorneys' fees for the collection of the outstanding $43,750.00 in attorneys' fees. Prior to submitting the case to the jury, the Court reminded counsel to review the evidence in the record and the settlement offers on the table.

Plaintiff's failure to accept Defendants' offer of judgment under Fed.R.Civ.P.68 and his failure to

reasonably evaluate the offers of settlement made before and during trial, particularly in light of the complete lack of evidence to support an award of past or future wages, prevents the court from allowing Plaintiff any recovery of costs or attorneys' fees in this case. Under both this Court's practice of requiring written offers of settlement and Fed.R.Civ.P.68, the normal procedure would be to award attorneys' fees to the defendants in this case. Instead of awarding fees back and forth between the parties, the Court has chosen to simply disallow any claim for attorneys' fees submitted by the Plaintiff. Therefore, in light of the evidence adduced at trial, the questions of law addressed in this order, and Plaintiff's actions in response to offers of judgment and settlement, the

final judgment in this case will require each party to absorb, his, her, or its own costs, including attorneys' fees.

Conclusion

As a matter of law, Plaintiff did not have a contract with Defendants providing that he would be re-employed upon the completion of the criminal proceedings against him or that all his criminal defense expenses would be covered. The Court will enter a judgment notwithstanding the verdict on this aspect of the Plaintiff's breach of contract cause of action. The Court finds that Stone Oak National Bank was required, pursuant to its bylaws, to reimburse the Plaintiff for expenses he incurred in the defense of the criminal charges against him, which arose out of his position as an officer of Stone Oak National Bank. As the

jury determined, Stone Oak National Bank did not fully discharge this responsibility by its flat fee agreement with C.J. Muller.

The Court also determined that Plaintiff is entitled to collect both pre-judgment and post-judgment interest on the jury's verdict of $43,750.00 in outstanding criminal defense expenses. In light of Plaintiff's action contrary to this Court's rules regarding reasonable settlement offers and the offer of judgment filed by defendants, each party will bear his, her, or its own costs in this case, including attorney's fees.

Accordingly, the Court enters the following orders:

IT IS ORDERED that the United State's Motion to Quash Subpoena [#167] and Fidelity & Deposit's Motion for Entry of

Judgment [#139] are each DISMISSED AS MOOT;

IT IS ORDERED that Plaintiff's Motion to Keep the Record Open for Two More Days [#188] is GRANTED;

IT IS ORDERED that Plaintiff's Motion for Leave to File Plaintiff's Motion for Judgment which Exceeds the Page Limitation [#191] is GRANTED; and

IT IS ORDERED that Defendants' Motion for Judgment N.O.V. [#190] and Plaintiff's Motion for Judgment on the Jury's Verdict are each GRANTED IN PART and DENIED IN PART, and a judgment will be entered for Plaintiff for $43,750.00, the amount the jury found to be outstanding attorneys' fees incurred by Plaintiff defending the criminal charges against him. Plaintiff shall take nothing by his remaining causes

of action against Stone Oak National Bank and Stone Oak Bankshares, Inc.

Signed on this 5th day of October 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO A-94-CV-20-SS

HARLAN D. VANDER ZEE,

VS.

THE HONORABLE JANET RENO, etc., et al.

ORDER

Be it remembered on this the 26th day of September 1995 the Court reviewed the file in the above-styled cause and considered Plaintiff's Motion to Supplement Record pursuant to Fed. R. App. P. 10(e). Plaintiff seeks to supplement the record with the trial testimony of Jesse Wong, an employee of the Comptroller of the Currency,[1] and a copy of Plaintiff's

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[1] Having heard the testimony of Mr. Wong, the Court is at a loss as to its relevance to any issue pending before the Fifth Circuit.

Exhibit No. 112. Neither the testimony of Mr. Wong nor Exhibit P-112 was before the Court at the time of its ruling which is the basis of Appeal No. 94-50702 before the Fifth Circuit. Therefore, supplementation of the record to reflect the matters before the district court, pursuant Fed. R. App. P. 10(e), is not appropriate.

Accordingly, the Court enters the following order:

It is ORDERED that Plaintiff's Motion to Supplement Record {#186} is DENIED.

SIGNED on this 26th day of September 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO A-94-CV-20-SS

HARLAN D. VANDER ZEE,

VS.

THE HONORABLE JANET RENO, etc., et al.

ORDER

BE IT REMEMBERED on this 10th day of October 1995 the Court reviewed the file in the above-styled cause and considered Plaintiff's Motion for Reconsideration of Order Denying Motion to Supplement the Record, and being of the view that the prior order remains correct according tot he rules of appellate procedure, the Court inters the following order:

IT ORDERED that Plaintiff's Motion for Reconsideration of Order Denying

Motion to Supplement the Record [#196] is DENIED.

SIGNED on this 10th day of October 1995.

Sam Sparks
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO A-94-CV-20-SS

HARLAN D. VANDER ZEE,

VS.

THE HONORABLE JANET RENO, etc., et al.

ORDER

Be it remembered that the Plaintiff's motion for extension of time to keep the record open to file verified copies of the corporate records of Stone Oak Bankshares and/or Stone Oak National Bank consisting of full copies of Amended Articles of Incorporation, and/or By-Laws of those two corporations, and the Court noting that neither of those corporations are now in existence because of a merger into the International Bank of Commerce, and Counsel's representation that a short extension of time is needed to obtain the

afore-described documents, now therefore Plaintiff shall have until the close of business on the 18th day of September to file the documents with the Court to be included in the trial record of this case.

SIGNED on this 19th day of September, 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

A-94-CV-20-SS

HARLAN D. VANDER ZEE

VS.

JANET RENO, ET AL

JURY NOTE NO. 4

WE'VE REACHED A VERDICT

SHANA PATE

PRESIDING JUROR

DATE 9/13/95

TIME 3:48PM

RESPONSE BY COURT:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 20 SS

HARLAN D. VANDER ZEE,

VS.

STONE OAK NATIONAL BANK and
STONE OAK BANKSHARES, INC.

VERDICT FORM

We the Jury unanimously answer the following:

QUESTION ONE:

Do you find from a preponderance of the evidence that in December 1990 Stone Oak Bank and C.J. Muller agreed that Mr. Muller would represent Harlan Vander Zee through the end of all criminal proceedings arising out of the Salinas bank transactions for a flat fee of $10,000.00.

Answer "Yes" or "No."

Answer: No

QUESTION TWO:

Do you find from a preponderance of the evidence that on or about May 20, 1990, Harlan Vander Zee and Stone Oak National Bank agreed that Stone Oak National Bank would pay the attorneys fees incurred in the defense of the criminal charges against Vander Zee and/or re-employ Vander Zee upon the completion of the criminal case against him.

Answer "Yes" or "No" to each of the following:

a. Attorneys Fees for Criminal Defense: YES

b. Re-employ at Stone Oak National Bank: YES

QUESTION THREE:

Do you find from a preponderance of the evidence that Stone Oak National Bank failed to comply with its agreement, if any, to pay the attorneys fees incurred in the defense of the criminal charges against Vander Zee and/or re-employ Vander Zee upon the completion of the criminal case against him.

Answer "Yes" or "No" to each of the following:

a. Attorneys Fees for Criminal Defense: YES

b. Re-employ at Stone Oak National Bank: YES

QUESTION FOUR:

What sum of money, if any, do you find from a preponderance of the evidence, if paid now in cash, would fairly and

reasonably compensate Harlan Vander Zee for the attorneys fees incurred after December 1990 for his criminal defense?

Answer in dollars and cents.

Answer: $43,750

If you have answered "Yes" to part "b" of Question Three, then answer the following question. Otherwise, do not answer the following question.

QUESTION FIVE:

What sum of money, if any, if paid now in cash, do find from a preponderance of the evidence would fairly and reasonably compensate Harlan Vander Zee for his damages, if any, that resulted from such failure to comply with the

agreement, if any, to re-employ Mr. Vander Zee?

Answer in dollars and dents for damages, if any, for each of the following:

a. Lost earnings incurred in the past: $200,000

b. Present cash value of earnings to be lost in the future: $50,000

Signed this 13th day of September 1995 at 3:46 o'clock p.m.

SHANA PATE

Presiding Juror

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE,

VS.

THE HONORABLE JANET RENO, etc., et al.

ORDER

Before the Court is Plaintiff's "Motion for Reconsideration of Granting of Summary Judgment on the Issue of Conspiracy and for Reconsideration of the Denial of Trial Subpoenas to One Federal Prosecutor, One Federal Employee, One Custodian of Records and Two Former Justice Department Attorneys." Having considered Plaintiff's motions, the Court declines the invitation to reconsider the summary judgment as to Plaintiff's common law conspiracy cause of action. Nor will the Court delay the trial of this matter

while Plaintiff pursues an interlocutory appeal of the issue to the Fifth Circuit.

The Court will not prohibit Plaintiff from issuing trial subpoenas to current or former government employees who have information relevant to the breach of contract issues remaining in this lawsuit.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Plaintiff's Motion for Leave to File Memorandum in Excess of 10 pages [#158] is GRANTED; and

IT IS ORDERED that Plaintiff's "Motion for Reconsideration of Granting of Summary Judgment on the Issue of Conspiracy and for Reconsideration of the Denial of Trial Subpoenas to One Federal Prosecutor, One Federal Employee, One Custodian of Records and Two Former

Justice Department Attorneys" is in all respects DENIED.

SIGNED on this 6th day of September 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE

VS.

STONE OAK NATIONAL BANK, ET AL.

ORDER

Before the Court are Stone Oak National Bank and Stone Oak Bankshares, Inc.'s Motion for Partial Summary Judgment, Plaintiff's response in opposition, and reply briefs of both parties. Having considered the motions and responses, the summary judgment evidence submitted, and the controlling law, the Court finds that Stone Oak National Bank and Stone Oak Bankshares, Inc.'s (collectively, Stone Oak) motion for summary judgment on the conspiracy cause of action should be granted.

The elements of a civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Times Herald Printing v. A.H. Belo Corp.*, 820 S.W.2d 206, 216 (Tex.App.--Houston [14th Distr.] 1991, no writ) (citing *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)). Stone Oak moves for summary judgment on Plaintiff's conspiracy cause of action contending he cannot satisfy the unlawful, overt act element of the cause of action.[1]

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[1] This Court previously denied Stone Oak's motion for summary judgment on the conspiracy claim by its order of January 6, 1995. At that time, Stone Oak attacked the existence of an agreement.

In response to the motion, Plaintiff identifies three acts which he contends were unlawful, overt acts of conspiracy. The acts identified by Plaintiff are: (1) "the denial of indemnification" by the settlement agreements between Stone Oak and the government; (2) "interference with Vander Zee's contract rights with the Bank to be employed and to be re-employed;" and (3) libel and slander. In each instance, the alleged co-conspirator was the government.

"As a general rule, an actionable conspiracy must consist of wrongs that could have been actionable against the individual conspirators." *Closs v. Goose Creek Consolidated Indep. Sch. Dist.*, 874 S.W.2d 859, 872 (Tex. App.--Texarkana 1994, no writ); *see also Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 (Tex.App.--

Dallas, 1989, writ denied). By previous orders of this Court, it has been determined that Plaintiff cannot maintain claims against the government or its agents for the acts indemnified. *See Vander Zee v. Janet Reno, et al.*, A-94-CA-020-SS (W.D. Tex., June 6, 1994 Order); *Vander Zee v. United States of America, et al.*, A-94-CA-469-SS (W.D. Tex., April 24, 1995 Order). Because Plaintiff may not maintain any of the overt act claims against the government or the federal agents, the actions taken by the government agents do not constitute unlawful acts. Consequently, Plaintiff may not maintain a conspiracy cause of action against Stone Oak based on the actions of the government employees. *Closs*, 874, S.W.2d at 872. Stone Oak's motion for partial summary judgment must be granted.

Additionally and alternatively, the Court finds that Plaintiff has failed to alleged unlawful acts by Stone Oak on which to base his conspiracy cause of action. The Court will address these alleged unlawful acts individually.

Attorneys' Fees and Employment

Plaintiff claims that the settlement agreement entered into between Stone Oak and the government, which barred payment of Vander Zee's legal fees "unless the Bank becomes legally obligated to do so," was an unlawful act in violation of Texas law and the bank by-laws. Plaintiff also alleges interference with his rights to employment and re-employment. At the suggestion of the government, the bank requested Vander Zee's resignation shortly after his indictment. Later, the

settlement agreement for the civil forfeiture matter contained a provision whereby the bank agreed not to re-hire Vander Zee.

The allegations based on reimbursement of attorneys' fees and his right to employment are both claims for conspiracy to breach contractual obligations. Breach of contract, in and of itself, does not create tort liability. The Fifth Circuit, interpreting Texas law, has held that in order to assert a claim for conspiracy to induce a breach of a contract, the conspiracy must involve "two or more non-parties' agreement." *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1038 (5th Cir. 1990). Plaintiff cannot meet this element of the conspiracy cause of action based on an agreement involving Stone Oak. Consequently, Plaintiff may not

rely on an agreement between Stone Oak and the government requesting his resignation or providing that he will not be reimbursed criminal defense costs or re-employed by Stone Oak as a basis for his civil conspiracy cause of action.[2]

Libel and Slander

Plaintiff also alleges a conspiracy in connection with alleged libel and slander of him by statements made in "leaks" to the press and in the November

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[2] The undisputed evidence before the Court is that Vander Zee was an at-will employee, subject to dismissal without cause, at the time of his resignation. *See Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985). There is no evidence that the request for Vander Zee's resignation violated any of the statutory or common law exceptions to the employment-at-will doctrine. *Id.* Despite Vander Zee's contentions to the contrary, Stone Oak's request of Vander Zee's resignation was not an unlawful act. *See Times Herald Printing co. v. A.H. Belo Corp.*, 820 S.W.2d 206, 216-17 (Tex.App.--Houston [14th Dist.] 1991, no writ).

1991 settlement agreement. Stone Oak argues that these defamation claims cannot support the conspiracy cause of action because they are barred by the statute of limitations and are privileged judicial communications.

Claims for libel and slander are governed by a one-year statute of limitations. Tex. Civ. Prac. & Rem. Code § 16.002 (Vernon 1986). It is undisputed that all of the alleged defamatory acts relied upon by Plaintiff were published more than a year before this suit was filed. The only communication Plaintiff argues is subject to a tolling of the limitations period is the November 1991 version of the settlement agreement. Consequently, Plaintiff may not rely on the communications to the media or the final version of the settlement agreement

for his conspiracy cause of action. *See Gulf Atlantic Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 102 (Tex.App.--Dallas 1985), *rev'd on other grounds*, 749 S.W.2d 762 (Tex. 1987).

Plaintiff argues that the November 1991 version of the settlement agreement was hidden from him until recently produced during discovery. He believes that this document is not subject to absolute privilege because the document was no filed with any court. The court finds this to be an overly restrictive reading of Texas law on absolute privilege.

Texas courts have held that communications that bear some relationship to the judicial proceedings are absolutely privileged. *See James v. Brown*, 637 S.W.2d 914, 197 (Tex. 1982); *Hill v. Herald-Post*

Publishing Co., Inc., 877 S.W.2d 774, 782 (Tex.App.--El Paso 1994), *rev'd on other grounds*, 891 S.W.2d 638 (Tex. 1994). The November 1991 settlement document contained provisions that it would be filed with the court under seal. Changes were made to the November version of the agreement and it was not filed. A substantially similar version was filed with the Court at a later date. The Court finds that the absolute privilege extends to drafts of substantially similar documents ultimately filed in a legal proceeding.[3] Therefore, Plaintiff may not rely on the November 1991 settlement document as a basis for unlawful acts in furtherance of his conspiracy claim.

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[3] The Court expresses no opinion as to the applicability of the privilege if a draft is published to the community prior to filing or in a different form than as ultimately filed.

Based on these determinations, the Court finds that Stone Oak's motion for partial summary judgment as to the civil conspiracy claims is meritorious and should be granted.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Plaintiff's Motion to Extend Time of Discovery for Good Cause Shown [#103], Plaintiff's Motion to Compel [#103], Plaintiff's Motion for Leave to File an Opposition to Stone Oak National Bank's Motion for Summary Judgment in Excess of Ten Pages [#109], Defendant Fidelity & Deposit's Motion to Schedule hearing on the Various Motions for Summary Judgment [#112], and Plaintiff's Motion for Summary Judgment on Liability Only [#117] are DISMISSED AS MOOT based on prior rulings of the Court;

IT IS ORDERED that Plaintiff's Motion for Leave to Exceed the Page Limit [#137] and Motion to Allow Letter Brief Exceeding Ten Pages [#145] are each GRANTED;

IT IS ORDERED that Defendants Stone Oak National Bank and Stone Oak Bankshares, Inc.'s Motion for Partial Summary Judgment [#128] is GRANTED as to Plaintiff's common law conspiracy causes of action; and

IT IS ORDERED that Plaintiff's Motion for Leave to File and Serve 5 Subpoenas [#148] is DENIED.

SIGNED on this 29th day of August, 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE,
Plaintiff

VS.

STONE OAK BANKSHARES, INC., ET AL.,
Defendants.

ORDER

Before the Court are Stone Oak National Bank and Stone Oak Bankshares, Inc.'s Motion for Summary Judgment, Fidelity & Deposit Company of Maryland's Motion for Summary Judgment, and Plaintiff Vander Zee's Motion for Partial Summary Judgment on Liability Only, along with responses filed by the various parties.

The background of this lawsuit has previously been described in the Court's Order of June 6, 1994. The remaining defendants in this case are Stone Oak National Bank, Stone Oak Bankshares, Inc.

(collectively, the Bank), and Fidelity & Deposit Company of Maryland (F&D). The causes of action remaining in this case are conspiracy among the defendants and the government (count 1), breach of contract by the Bank[1] (count 2), deceptive trade practices (DTPA) and insurance claims against the Bank and F&D (count 3), and breach of the insurance contract by F&D (count 5).

The Bank's Motion for Summary Judgment

* **Conspiracy**

The Bank moves for summary judgment on each of plaintiff's claims against it. Taking the claims in order, first, the Bank argues plaintiff has failed to state a claim for conspiracy. Plaintiff alleges the Bank was a participant with the United

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[1] Plaintiff also argues the Bank had a duty under Texas law to indemnify him for his attorney's fees.

States Government in a conspiracy to deprive him of his constitutional rights. Specifically, by demanding plaintiff's resignation and participating in the settlement agreement with the Government in the civil forfeiture case, the Bank's agreement not to re-hire plaintiff or to reimburse the costs and expenses of his criminal defense deprived him of his property interest in his job without due process of law.

The Bank maintains plaintiff cannot state a claim for conspiracy because the Government left the Bank no choice but to enter into the settlement agreement according to the terms presented. Further, plaintiff cannot pursue claims based on sections 1981[2] or 1985(3)[3] because these

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[2] 42 U.S.C. § 1981.

[3] 42 U.S.C. § 1985(3).

provisions apply only to discrimination based on race or alienage, or under section 1985, some other type of class-based discrimination. Finally, the Bank argues that plaintiff has no claim under section 1983[4] because he has not alleged action under the color of state law.

Plaintiff responds that he has stated a claim for civil conspiracy under Texas law. Plaintiff relies on *Fenslage v. Dawkins*, defining civil conspiracy as "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." 629 F.2d 1107,1110 (5th Cir. 1980) (quoting *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968)). Plaintiff alleges the actions of the federal government

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[4] 42 U.S.C. § 1983.

officials were unlawful and the Bank was a participant in the conspiracy through its actions in requesting his resignation and pursuant to the settlement agreement. Plaintiff argues section 1985(3) claims are not limited to racial discrimination, but rather extend to conspiracies to deprive "a class of innocent bankers" of their constitutional rights. Finally, plaintiff concedes that he cannot state a claim under section 1983 because the Bank took no action under the color of state law.

In order for a civil conspiracy to be actionable under Texas law, the conspiracy must be to accomplish an unlawful purpose or a lawful purpose by unlawful means. *Id.* Plaintiff asserts the unlawful activity was depriving him of "employment and his liberty interest in being employable

without due process of law." The Bank argues that it has not "conspired" with anyone to deprive plaintiff of his rights. It claims it suffered at the hands of the government just as plaintiff did because it had no choice but to accept the settlement agreement as drafted by the government. The question of whether or not the Bank's actions constitute a conspiracy with the Government to deprive plaintiff of his rights is a fact question for the jury.

Plaintiff has not alleged discrimination based on race or national origin. Actions based on 42 U.S.C. § 1981 are limited to claims of discrimination based on race or national origin. *See Daigle v. Gulf States Utilities Co., Local No. 2286,* 794 F.2d 974, 980 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 648

(1986). Therefore, plaintiff has not stated a claim for relief under section 1981.

Plaintiff contends that he has stated a claim under section 1985 based on a conspiracy against a class of innocent bankers, of which he is a member. According to plaintiff, the purpose of the conspiracy was to intimidate the bankers for "some perceived benefit to the Department of Justice's political image, or alternatively the image of persons working for that department." The United States Supreme Court has held "there must be some racial, or perhaps otherwise class-based **invidiously discriminatory animus** behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S. Ct. 1791, 1798 (1971) (emphasis added). Although plaintiff has attempted

to identify a class against which the conspiracy was directed, plaintiff has not alleged, or otherwise shown, any invidious discriminatory animus on the part of the alleged conspirators. In fact, plaintiff's contention is that the motivation was improving the Department of Justice's political image, not ill-will toward a class of bankers. Accordingly, plaintiff's conspiracy claims are not within section 1985(3) because there is no allegation of an invidious discriminatory animus. *See Burns-Toole v. Byrne,* 11 F.3d 1270, 1276 (5th Cir. 1994). Because section 1986 is contingent on violations of section 1985, plaintiff has no claim under section 1986.

*** Breach of Contract**

Next, the Bank argues it has discharged its obligation to pay plaintiff's attorney's fees and costs in

the criminal action. Plaintiff assets that the Bank had an obligation to indemnify him for his criminal defense costs pursuant to an oral contract and under Texas Corporation Law.

On December 13, 1990, the Bank reached an agreement with Chad Muller, plaintiff's criminal defense attorney, to limit the Bank's responsibility for plaintiff's defense costs. Prior to reaching this agreement, the Bank had paid approximately $55,000.00 to Muller for defense costs. The Bank offered a flat fee of $10,000.00 for Muller's "representation of Mr. Vander Zee through final disposition of the case." Muller accepted the offer by a letter dated December 13, 1990. Plaintiff now seeks to recover an additional $66,000.00 in attorney's fees and costs expended for his criminal

defense. Approximately $10,000.00 is for defense of the first indictment and the remaining $56,000.00 was expended defending against the second indictment.

The Bank argues its agreement with Muller to pay a flat $10,000.00 for defending Vander Zee discharged its obligation. The argument is based on the view that the second indictment was part of the same matter, and therefore covered by the flat fee agreement with Muller.[5]

Plaintiff contends he never released the Bank from its duty of indemnification and that the second indictment was a different matter and involved a second contract with Muller for his defense. According to plaintiff, he was not aware that Muller had accepted the Bank's flat

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[5] The second indictment contained the same counts as the original indictment plus a conspiracy count.

fee offer until October 1992. In addition, Muller testified in his deposition that he believed the agreement was fulfilled when the first indictment was dismissed.

Regardless of what the Bank and Muller considered the extent of their agreement to be, Vander Zee was not a party to the agreement. Therefore, the Bank's responsibility to indemnify Vander Zee for his attorney's fees and costs could not be obviated by an agreement with Muller.[6] The Bank will not prevail at summary judgment on the basis of its agreement with Chad Muller.

***DTPA**

Finally, the Bank asserts plaintiff has failed to state a cause of action

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[6] In its motion for summary judgment, the Bank does not contest its responsibility to indemnify plaintiff, instead only arguing it has discharged that duty.

under the Deceptive Trade Practices Act (DTPA) because plaintiff is not a "consumer" with regard to the Bank and the Bank did not make an actionable representation to plaintiff. Plaintiff argues that he was a consumer as a beneficiary of the Bank's insurance policy with F&D, and that the Bank's actions in connection with denying payment under the policy are actionable under the DTPA.

Consumer status is a threshold requirement for maintaining a DTPA cause of action. Tex. Bus. & Com. Code Ann. § 17.45 (West 1987). The determination is a question of law for the Court. *See Holland Mortgage & Investment Corp. v. Bowes*, 751 S.W.2d 515, 517 (Tex.App.---Houston [1st Dist.] 1987, writ ref'd n.r.e.). A "consumer" is "an individual . . . .who seeks or acquires by purchase or lease,

any goods or services." Tex. Bus. & Com. Code Ann. § 17.45(4) (West 1987).

Plaintiff bases his consumer status on the Bank's purchase of a directors and officers (D&O) insurance policy from F&D which he claims provided coverage for him. He argues that the Bank's involvement in the transaction provides him with consumer status against the Bank.

It is well established that consumer standing is established by the relationship to the transaction, not by a contractual relationship between the plaintiff and defendant. *See Kennedy v. Sale*, 689 S.W.2d 890, 893 (Tex. 1985); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705,707 (Tex. 1983). *Kennedy* resolved the issue of whether an employee is a consumer in relation to an insurance agent, based on a policy purchased on his

behalf by his employer. The *Kennedy* Court held the employee had consumer status because he "acquired" the policy benefits by purchase, even though the purchase was through his employer. *Kennedy*, 689 S.W.2d at 892.

This case presents a twist that the Bank argues takes it beyond the holding in *Kennedy*. In the case before this Court, plaintiff is seeking to establish consumer status with regard to his employer, the Bank, who purchased the D&O policy for his benefit. The Bank argues consumer standing has not been established because plaintiff did not "acquire" the policy from it.[7]

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[7] The Bank cites *Home Savings Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987), for the proposition that an innocent participant in a business transaction is not liable under the DTPA. *Home Savings*, however, was decided on the issue of producing cause rather than on consumer standing. 733 S.W.2d at 136.

The Bank purchased the D&O policy for the benefit of its officers and directors, presumably including plaintiff. Therefore, plaintiff was a "consumer" in relation to F&D, who provided the D&O policy because he was a consumer in relation to transaction. *Kennedy*, 689 S.W.2d at 892. Because the Bank was a participant in the transaction, plaintiff has consumer statues under the DTPA with regard to the Bank. *Id.*

Next, the Bank argues it made no actionable representations regarding the D&O policy issued by F&D. Plaintiff's Revised Second Amended Complaint alleges the Bank:

> (1) "interposed spacious and non-applicable defenses instead of paying the claim after it became apparent...the Bank was liable under Texas law requiring indemnification of losses of a Director and Officer;"

(2) represented the policy had sponsorship, approval, characteristics, ingredients, uses and benefits which they do not have;

(3) represented the policy conferred or involved remedies, or obligations which the Bank now it does not have to involve; and

(4) committed unconscionable conduct in failing to pay the amount due to plaintiff under the policy.

Plaintiff's argument in response to the motion for summary judgment is two-fold. First, plaintiff argues the Bank's statements to him that the officers and directors of the Bank were "protected" constitute actionable representations. The second argument is that the Bank acted unconscionably when it "co-operated with the government and the insurance company to deprive Vander Zee of benefits clearly due under the policy."

Addressing first the representations made by the Bank that plaintiff was

"protected under the policy, the Court finds that plaintiff had not presented evidence of an actionable representation by the Bank. The deposition testimony of plaintiff indicates that no specific representations regarding the policy was made.[8] Plaintiff's general allegation that the Bank told him he was "protected" does not even refer to coverage for criminal defense costs. In order to be actionable, a representation must be a producing cause of plaintiff's damages. See *McKnight v. Hill & Hill Exterminators*, 689 S.W.2d 206, 209 (Tex. 1985). Plaintiff has not produced any evidence of representations which could be a producing cause of his damages. Because plaintiff has failed to sustain his burden of presenting evidence

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[8] See Oral Deposition of Harlan D. Vander Zee, taken July 27, 1994, p. 129.

on his DTPA misrepresentation claims, summary judgment is will be granted in favor of the Bank on these claims.

The issue of the Bank's agreement with the U.S. Government obviously does not constitute a representation as to the characteristics of the policy or rights under the policy. If the agreement between the Bank and the Government is actionable under the DTPA, it would have to be as an unconscionable act or course of action. *Id.* § 17.50(a)(3). The definition of an unconscionable act or course of conduct applicable to this circumstance is "an act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or

capacity of a person to a grossly unfair degree." *Id.* § 17.45(5).[9]

Although the agreement between the Bank and the government was clearly to plaintiff's detriment, plaintiff has not shown how the agreement took advantage of his lack of knowledge, ability, experience or capacity. In fact, regardless of plaintiff's knowledge, ability, or experience, he would have been unable to prevent the agreement reached between the two parties. Summary judgment will be granted on plaintiff's claims of unconscionable actions by the Bank.

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[9] An unconscionable act is also defined as an act or practice which, to person's detriment "results in a gross disparity between the value received and consideration paid, in a transaction involving consideration." *Id.* § 17.45(5)(B). This definition is not applicable to the Bank's actions because there is no evidence of consideration between plaintiff and the Bank with regard to the D&O policy.

*** Summary**

Plaintiff's conspiracy claims based on sections, 1981, 1983, 1985, and 1986 are dismissed, but plaintiff may proceed with his claims for civil conspiracy under Texas law. Summary judgment on the breach of contract action is denied. Finally, summary judgment will be granted for the Bank on all of plaintiff's DTPA claims.

Claims Between Vander Zee and F&D

F&D moved for summary judgment on each of the claims pending against it in this case and its counterclaims for declaratory judgment on the insurance policies. Plaintiff responded to F&D's motion and moved for partial summary judgment on the same issues.

*** Insurance Coverage**

The first issue before the court is a determination of which of the policies

could potentially provide coverage to plaintiff for the costs and expenses of his criminal defense. F&D issued four directors and officers (D&O) liability policies to the Bank covering the period from June 1, 1986 through June 1, 1990, with a 90-day extension at the end of the period. Each policy is a claims made policy. F&D argues only policy No. DOB 6087 527-3, effective June 1, 1989 through June 1, 1990 (1989-90 policy) could possibly provide coverage to plaintiff because notification of a potential claim was given during that period.[10] The Bank

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[10] The Bank exercised its right to purchase a 90-day extension on the 1989-90 policy in which to report claims on wrongful acts occurring prior to June 1, 1990.

notified F&D of the first indictment of plaintiff on June 1, 1990.[11]

All four policies issued by F&D were claims made policies. It is undisputed that the earliest possible notification to F&D was during the 1989-90 policy period.[12] Therefore, the 1989-90 policy is the applicable policy for determining whether coverage exists for plaintiff's attorney's fees and costs.

Plaintiff maintains that the terms of the 1986-87 policy should control coverage under the 1989-90 policy due to changes in

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[11] Vander Zee was first indicted May 10, 1990.

[12] Plaintiff argues that initial notification occurred in August 1989, while F&D contends notification occurred June 1, 1990. the Court need not determine the exact date of notification because both contended dates are within the coverage period of the 1989-90 policy.

the terms of the policies without notice.[13] F&D contends the four policies were separate policies, rather than renewals, and that, regardless, the Bank had notice of the changes in the policy terms.

Plaintiff's contention on this point is not supported by any evidence before the Court. In addition to the language at the top of each policy advising insureds to review the policy and to discuss coverage with their agent or broker and attorney, the deposition testimony of Donald Jordan and Charles Curry, Jr. support F&D's position on changes to the policies. Mr. Jordan, an insurance agent and member of the Bank's board of directors, testified that he read the

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[13] The primary changes at issue occurred in the definitions of "wrongful act" and "loss" for which coverage is provided.

policies and that the policies became more restrictive over time.[14] Mr. Curry testifies the Bank had to reapply for insurance each year and that he would skim through the policies and give them to the CEO to read.[15] Plaintiff has presented nothing more than cursory allegations that the policies were changed without notice. Therefore, the Court finds that the 1989-90 policy is the only policy at issue and its terms control.

Having determined that the 1989-90 policy is the only policy at issue in this case, the Court must evaluate the terms of the policy, first to determine whether they are ambiguous. *See Brooks, Tarlton, Gilbert, Douglas & Kressler v. United*

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[14] Oral Deposition of Donald Jordan, p. 10.

[15] Deposition of Charles William Curry, Jr., pp. 128-129.

States Fire Ins. Co., 832 F.2d 1358, 1364 (5th Cir. 1987). Ambiguity exists when there are two reasonable interpretations of the policy. *Id.* at 1365. Only if ambiguity is found do the special rules of construction that favor insureds come into play. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 918 (Tex.App.--Ft. Worth 1988, writ denied).

The provisions of the D&O policy at issue here are as follows:

INSURING CLAUSES

...the Company agrees:

> (a) with the Directors and Officers of the Bank that if, during the Policy Period, any claims are made against the Directors and Officers for a Wrongful Act and reported to the Company during the Policy Period, the Company will pay, in accordance with the terms of this policy,...all Loss which the Directors and Officers shall become legally obligated to pay, except for such Loss which the Directors and Officers are

indemnified by, or are entitled to indemnification by, the Bank;

...

DEFINITIONS

(d) the term "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay for a claim or claims made against the Directors and Officers for Wrongful Act(s) and shall include only damages, judgments, settlements and costs, charges and expenses (excluding salaries of...) **incurred in the defense of civil legal actions** and appeals therefrom, and costs of attachment or similar bonds; provided however, such **Loss shall not include**...(2) **any amounts incurred in connection with** and administrative, regulatory, **criminal** or grand jury **proceedings,**...

(e) the term "Wrongful Act" shall mean any actual or alleged error, misstatement, misleading statement, act or omission or breach of duty by the Directors and Officers, **based on negligence**, in the discharge of their duties solely in their capacity as Directors and Officers of the Bank.

...

EXCLUSIONS

The Company shall not be liable to make any payment for Loss in connection with any claim made against the Directors and Officers:

...

> (e) brought about or contributed to by the...criminal acts...of the Directors and Officers, but this exclusion shall not apply to a claim upon which suit may be brought by reason of any alleged ... criminal acts... on the part of the Directors and Officers unless:
>
> (i) a judgment or other final adjudication thereof ... adverse to any of the Directors and Officers shall establish dishonesty, fraud, criminal acts or intentional misconduct, or ...

F&D argues the policy does not provide coverage for criminal defense costs because the policy only covers a "Loss" incurred on a claim based on a "Wrongful Act." F&D relies on the definitions of "Loss" and "Wrongful Act," which exclude criminal matters. The

definition of "Loss" includes expenses "incurred in the defense of civil legal actions," and specifically excludes amount "incurred in connection with any ... criminal or grand jury proceedings." Under the policy, "Wrongful Act" means acts "based on negligence." F&D argues these definitions of terms in the insuring clause exclude for plaintiff's criminal defense costs.

Plaintiff believes coverage is found only by looking to the "operative paragraphs," which do not include the definitions. Plaintiff relies on language in the Exclusions paragraph to find coverage when an officer is cleared of wrongdoing. The exclusions section provides that F&D is not liable for loss brought about by criminal acts of directors and officers. The exclusion

does not apply to claims upon which suit is brought by reason of criminal acts of an officer, unless the criminal act is established by judgment or final adjudication. Plaintiff argues this exclusion clause places criminal defense costs back within policy coverage in cases when the officer is successful in his defense.

F&D maintains that an exclusion in a policy operates only "to exclude coverage that might otherwise exist; it does not afford coverage in the first instance." In addition, the exclusion clauses apply only to a "loss," the definition of which covers civil cases and does not include criminal defense costs. Therefore the exclusion clause is never reached in determining whether or not criminal defense costs are covered.

The Court finds that F&D's interpretation of the policy is the only reasonable one, and therefore there is no ambiguity. The Court must attempt to construe the contract so as not to render any of its terms meaningless. See *Ideal Mutual Ins. Co. v. Last Days Evangelical Ass'n.*, 783 F.2d 1234, 1238 (5th Cir. 1986). Plaintiff's suggested interpretation requires the Court to ignore the policy definition of "loss," which specifically excludes costs associated with a criminal defense.

Further, plaintiff's reading, which requires the Court to look to an exclusion to create coverage that is specifically excluded in the insuring clause, is not reasonable. The language plaintiff relies on simply prevents exclusion of coverage for civil claims based on criminal conduct

when the insured prevails. The exclusion contains no language that suggests it opens the door to criminal defense costs.[16]

*** DTPA, Insurance Code, and Bad Faith**

F&D has moved for summary judgment on what it collectively terms plaintiff's bad faith claims on grounds the action is barred by the statute of limitations and F&D had a reasonable basis not to indemnify Vander Zee. As pointed out by F&D, it is not entirely clear from

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[16] Even if plaintiff's attorney's fees were a "loss" covered under the policy, he would be barred from recovery by the exception found at the end of Insuring clause (a). The clause excepts from coverage "such Loss for which the Directors and Officers are indemnified, or are entitled to indemnification by, the Bank." The issue with regard to the Bank's indemnification of plaintiff is whether the Bank satisfied its obligation through its agreement with Chad Muller. Accordingly, plaintiff's attorney's fees, even if a "loss," were indemnified or entitled to indemnification by the Bank, and therefore would not be covered by F&D's policy or insurance.

plaintiff's Revised Second Amended Complaint whether plaintiff's claims against F&D are based on the DTPA, Article 21.21, and/or breach of the common law duty of good faith and fair dealing. The common thread running throughout the allegations, however, is that F&D has violated these provisions by failing to indemnify plaintiff as required under the insurance contract.[17] Having prevailed on the contract claim, F&d cannot have violated the DTPA, Article 21.21, or breached the duty of good faith and fair dealing by asserting bad faith contract defenses, the only violations alleged by plaintiff against F&D. *See Beaumont Rice*

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[17] Plaintiff's DTPA claims (Count III) against the Bank and F&D allege that false representations were made regarding the characteristics and rights under the insurance agreement. Plaintiff, however, has failed to identify any representations made by F&D.

Mill, Inc. v. Mid-American Indemnity Insurance Co., 948 F.2d 950, 952 (5th Cir. 1992) (applying Texas law). Thus, summary judgment on plaintiff's bad faith claims will be granted as to F&D.

*** Conspiracy**

Finally, F&D moves for summary judgment on plaintiff's conspiracy claims (Count I). Plaintiff's conspiracy claims against F&D are based on an alleged conspiracy to deny plaintiff reimbursement for his legal fees. (*See* Deposition of Harlan Vander Zee, Vol. ii, pp.22-24). Plaintiff admits that he knows of no facts to support his claims of a conspiracy involving F&D, other than the fact he has not been reimbursed under the policy. *Id.* He argues, however, that no evidence will be available until the depositions of Mr.

Bayless and Mr. Curry are completed.[18] In the unlikely event the depositions produce evidence of F&D's involvement in a civil conspiracy with the Bank and the government, the Court will allow plaintiff to complete the depositions of Curry and Bayless and file any additional evidence that becomes available **from those depositions.** Plaintiff, however, will be limited to a five page submission, excluding exhibits, to demonstrate a fact issue with regard to the civil conspiracy. This submission must be filed within ten days of the completion of the aforementioned depositions.

*** Attorney's Fees**

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[18] On December 15, 1994, the Court granted in part and denied in part plaintiff's motion to compel answers to deposition questions posed to Samuel Bayless.

Under count five of its counterclaim, F&D requests an award of attorney's fees pursuant to section 17.50(c) of the DTPA. Tex. Bus. & Com. Code Ann. § 1750(c) (West 1987). This section provides for an award of attorneys' fees " on a finding by the court that an action under this section was groundless and brought in bad faith, or brought for the purpose of harassment." *Id.* The question of whether a DTPA claim is groundless and in bad faith, or for the purpose of harassment is a question for the Court. *See Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634, 637 (Tex. 1989).

In its motion for summary judgment, F&D sought summary judgment in its favor on count five of its counterclaim. However, in its reply to plaintiff's response, F&D requested that it be allowed

to proceed on count five. The court will take up the issue of attorney's fees under section 17.50(c) at the conclusion of all claims pending against F&D.

F&D also requests an award of attorney's fees, pursuant to count six of its counterclaim, based on the Texas Declaratory Judgment Act. Counts one through four of F&D's counterclaim against plaintiff under the D&O policies it issued to the Bank. When the counterclaim was filed, the issue of F&D's liability under the contract was already before the Court as a part of plaintiff's breach of contract action and bad faith claims.

"A counterclaim brought under the Declaratory Judgment Act presenting no new controversies but brought solely to pave an avenue to attorneys fees is improper." *Redwine v. AAA Life Insurance Co.*, 852

S.W.2d 10, 17 (Tex.App.--Dallas 1993, no writ). Because F&D's counterclaim for declaratory relief presented no new controversies, this court will not award attorneys' fees under the Texas Declaratory Judgment Act. Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1986). Furthermore, the Court finds that an award of attorneys fees is not just and equitable in this case. *Id.*

*** Summary**

Summary judgment will be granted in favor of defendant F&D on all claims against it, with the exception of the conspiracy claim, which is reserved pending the completion of two depositions. F&D's request for attorney's fees under the DTPA is reserved until the case is concluded. The request for attorney's fees

under the Texas Declaratory Judgment Act is denied.

Conclusion

Consistent with the Court's discussion of the issues presented by the various motions for summary judgment, the Court enters the following orders:

IT IS ORDERED that Defendant Stone Oak National Bank and Stone Oak Bankshares, Inc.'s Motion for Summary Judgment [#98] is hereby GRANTED IN PART and DENIED IN PART as follows:

> The motion is granted as to plaintiff's claims under 42 U.S.C. § § 1981, 1983, 1985, and 1986, but denied as to plaintiff's claims of civil conspiracy;[19]

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[19] Although the Court is dismissing plaintiff's claims under Title 42 of the United States Code, the Court retains

The motion is denied with regard to plaintiff's breach of contract claims; and

The motion is granted with regard to all plaintiff's DTPA claims.

IT IS ORDERED that Fidelity & Deposit Company of Maryland's Motion for Summary Judgment [#96] and Plaintiff's Motion for Partial Summary Judgment are GRANTED IN PART and DENIED IN PART as follows:

F&D's motion is granted, plaintiff's motion is denied, and judgment is granted in favor of Fidelity & Deposit Company of

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subject matter jurisdiction over the case because plaintiff's civil conspiracy claim "necessarily turn[s] on some construction of federal law." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807, 106 S. Ct. 3229, 3232 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 103 S. Ct. 2841, 2846 (1983))

Maryland with regard to Plaintiff's claims for coverage under the insurance contracts issued to Stone Oak Bank and plaintiff's DTPA, Insurance Code, and bad faith claims;

Ruling on F&D's motion with regard to the conspiracy count is withheld pending plaintiff's submission of evidence to be filed within ten days of the completion of the depositions of Mr. Bayless and Mr. Curry;

Ruling on F&D's motion for attorneys' fees under the DTPA is withheld pending resolution of all claims against F&D; and

F&D's request for attorneys' fees pursuant to the Texas Declaratory Judgment Act is denied.

IT IS FURTHER ORDERED, as a matter of housekeeping, that plaintiff's motion to extend time to file a response to F&D's motion for summary judgment [#97], motion for leave to file an opposition to F&D's motion for summary judgment in excess of 10 pages [#100], motion for an extension of time to respond to Stone Oak Bank's motion for summary judgment [#101], motion for leave to file a supplemental opposition to F&D's motion for summary judgment [#102], motion for leave to file a motion for partial summary judgment in excess of 10 pages [#106], and motion for leave to file an opposition to Stone Oak Bank's motion for summary judgment in excess of 10 pages are each GRANTED; and

IT IS FURTHER ORDERED that plaintiff's motion to stay pending discovery [#101], plaintiff's motion to

stay dispositive motions pending completion of discovery [#102], and defendant F&D's motion to schedule a hearing on the various motions for summary judgment [#112] are hereby OVERRULED.

SIGNED on this 6th day of January, 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO. A 94 CA 020 SS

HARLAN D. VANDER ZEE

VS.

STONE OAK NATIONAL BANK, ET AL.,

ORDER

Before the Court is Plaintiff's Resubmission of Request for an In Camera Inspection of documents withheld by Stone Oak National Bank (Stone Oak). Also before the Court is Fidelity & Deposit Company of Maryland's (F&D) Request for Entry of Summary Judgment on Conspiracy Claim.

Plaintiff urges this court to conduct an in camera inspection of documents withheld by Stone Oak which **may** contain evidence of F&D's involvement in the alleged conspiracy. Plaintiff admits that

he has no other evidence of F&D's involvement in any conspiracy at this time.[1]

All of the documents Plaintiff urges the Court to review in camera are letters and/or memos created on or after September 30, 1993. This suit was initially filed prior to September 30, 1993. From the provided description, the documents at issue relate to the preparation of documents or other matters related to the defense of this lawsuit by Stone Oak Bank. It is apparent from these descriptions that none of the documents at issue are relevant to the issue of whether F&D was involved in a conspiracy to deny Plaintiff

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[1] By an order signed January 6, 1995, this Court granted summary judgment in favor of F&D on all but one claim, withholding ruling on the conspiracy claim pending the completion of the depositions of Mr. Curry and Mr. Bayless.

reimbursement of his criminal defense attorneys' fees. Therefore, the request for in camera inspection is denied.

In light of the Plaintiff's admission that he has no evidence to support his conspiracy claim against F&D, the Court will enter summary judgment in favor of F&D on the remaining conspiracy claim.

Finally, F&D seeks an award of attorneys' fees pursuant to Count V of its original counterclaim. F&D seeks attorneys' fees under section 17.50(c) of the DTPA and section 16(c) of Art. 21.21 of the Texas Insurance Code. An award of attorneys' feed under either statute requires a finding that the claims brought by the plaintiff were groundless and brought in bad faith or for the purposes of harassment. In order to enable the Court to make a determination on this

point, F&D shall file a brief with accompanying fee request in compliance with Local Rule CV-7(j) within 14 days of the date of this order.

Accordingly, the Court enters the following orders:

IT IS ORDERED that Plaintiff's Resubmission of Request for In Camera Inspection [#123] is DENIED;

IT IS ORDERED that Fidelity & Deposit Company of Maryland's Request for Entry of Summary Judgment on Conspiracy Claim [#124] is GRANTED; and

IT IS ORDERED that F&D shall file a brief on the issue of attorneys' fees within fourteen (14) days of the date of this order.

SIGNED on this 29th day of May, 1995.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE
Plaintiff,

vs.

THE HONORABLE JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES;
ET AL.,
Defendant.

FINAL JUDGMENT

BE IT REMEMBERED that on the 6th day of June 1994 the Court entered on Order dismissing all causes of action against the United States of America, Jack C. Frels, Ronald Ederer, Robert Mueller III, and Helen Eversberg in the above-styled and numbered case. Pursuant to that Order, the Court enters the following judgment:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all causes of action brought against Jack C. Frels, Ronald Ederer,

Robert Mueller III, and Helen Eversberg, in their individual capacities are DISMISSED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all causes of action brought against the United States of America are DISMISSED.

SIGNED this 25th day of August 1994.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE,
Plaintiff,
vs.
THE HONORABLE JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES;
ET AL.,
Defendant

ORDER

BE IT REMEMBERED on this the 19th day of August 1994 the Court held a motions hearing for the above-captioned case. This file has become, to say the least, quite unruly. There are several pending motions which have been mooted by the Court's June 6, 1994 Order dismissing the United States and certain government officials in their individual capacities. Since that Order, the parties have filed additional motions, and even an additional lawsuit, which the Court addressed at the hearing. Finally, the Plaintiff has filed a "Motion for Leave to Amend and/or Alternatively Motion

for Leave to File a New Related Complaint Based Upon the Federal Tort Claims Act and Motion for Reconsideration" which was the primary substantive motion considered by the Court in the hearing. Pursuant to the rulings from the bench, the Court enters the following Orders:

IT IS ORDERED that the Plaintiff Vander Zee's "Motion to Extend Time to Respond to the Motion to Transfer Venue," filed in this Court on January 13, 1994 (but filed at an earlier date in the United States District court for the Western District of Texas, Midland/Odessa Division), is DENIED AS MOOT.

IT IS ORDERED that the Plaintiff Vander Zee's Motion for Preliminary Injunction, filed in this Court on January 13, 1994 (but filed at an earlier date in the United States District court for the

Western District of Texas, Midland/Odessa Division) is DENIED AS MOOT.

IT IS ORDERED that the Plaintiff Vander Zee's "Motion to Extend Time to Answer the Government's Motion to Dismiss on Behalf of Individually Named Defendants," filed April 7, 1994, is DENIED AS MOOT.

IT IS ORDERED that the Plaintiff Vander Zee's "Motion to Extend Time to Answer Fidelity & Deposit's Motion to Dismiss, Motion for More Definite Statement, and Motion to Sever," filed April 7, 1994 is DENIED AS MOOT.

IT IS ORDERED that the Defendant fidelity & Deposit's Motion to Extend Time to File Scheduling Order, filed April 7, 1994, is DENIED AS MOOT without prejudice to Fidelity & Deposit filing a similar motion after the Plaintiff complies with

court's Order (set forth below) requiring him to file an amended complaint in Cause #94-CV-469.

IT IS ORDERED that the Plaintiff's "Motion for Leave to Amend and/or Alternatively Motion for Leave to File a New Related Complaint Based upon the Federal Tort Claims Act and Motion for Reconsideration," filed June 27, 1994, is DENIED.

IT IS ORDERED that the Plaintiff SHALL FILE AN AMENDED COMPLAINT in Cause # 94-CV-469 WITHIN 10 DAYS specifying which particular defendants are being sued and what causes of action remain in light of the Court's denial of the "Motion for Leave to Amend and/or Alternatively Motion for Leave to File a New Related Complaint Based Upon the Federal Tort Claims Act and Motion for Reconsideration;" the Court

will eliminate all the causes of action it deems were decided in the June 6, 1994 Order and dismiss defendants as necessary.

IT IS ORDERED that Plaintiff Vander Zee's Motion for Leave to File a Motion that Exceeds the Page Limitation, filed June 29, 1994, is GRANTED.

IT IS ORDERED that the United States' Motion to Sever Federal Defendants from Cause # 94-CV-020, requested orally at the August 19, 1994 hearing, is GRANTED and the Court will enter a separate FINAL JUDGMENT accordingly.

IT IS ORDERED that Plaintiff Vander Zee's Motion for Leave to File a Brief That Exceeds the Page Limitation, filed August 15, 1994, is GRANTED.

SIGNED this 25th day of August 1994.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NO A 94 CA 020 SS

HARLAN D. VANDER ZEE,
Plaintiff,

vs.

THE HONORABLE JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES;
ET AL.,
Defendant.

ORDER

BE IT REMEMBERED on this the 6th day of June 1994 the Court reviewed the file in the above-captioned case. At a motions hearing held on April 8, 1994, the Court heard argument from all parties concerning the Motions to Dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), of The United States of America and of the individual Defendants Jack C. Frels,

Ronald Ederer, and Robert Mueller III.[1] Having considered the arguments proffered at that hearing along with all the relevant pleadings filed to date, the Court enters the following Order:

Background

In 1983, Mario Alberto Salinas-Trevino (Salinas) began making large cash deposits in the Stone Oak National Bank in San Antonio. At the time Salinas made these deposits, Plaintiff, Harlan D. Vander Zee (Vander Zee), was serving as

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[1] On February 28, 1994, the United States filed a Motion to Dismiss on behalf of all United States employees named in the Amended Complaint, including the persons sued individually. At that time, the individual defendants Helen Eversberg, Jack C. Frels, Ronald Ederer, and Robert Mueller III had not received service of process. Subsequently, Defendants Frels and Ederer received service and filed a combined Motion to dismiss on March 28, 1994. Defendant Mueller, the last to receive service, filed his own Motion to Dismiss on May 18, 1994.

executive vice-president of the bank. Suspicious of the deposits, Vander Zee conferred with, among others, Herbert Pounds, Jr. (the bank's President) about the proper procedure for reporting them to federal agencies and law enforcement authorities. Vander Zee and other bank personnel continuously apprised the FBI, IRS, Treasury Department, Comptroller of the Currency, Secret Service, and Federal Reserve about Salinas' transactions with the bank. They also complied with IRS regulations requiring them to record all cash deposits exceeding $10,000. It appears from the pleadings that the reporting procedure of Vander Zee and the other bank employees satisfied the federal regulations and the authorities never instructed Vander Zee to cease accepting

Salinas' deposits or to change the procedure in any way.

In March of 1989, Salinas was arrested and indicted on drug trafficking charges. Despite Vander Zee's apparent compliance with federal regulations, in May of 1990, the United States Attorney obtained an indictment of Vander Zee on money laundering charges in connection with the Salinas deposits. Curiously, Vander Zee's indictment was issued three weeks after Salinas escaped custody and became a fugitive. Also noteworthy is Vander Zee's allegation that, after the issuance of his indictment, the Office of the Comptroller of the currency coerced the bank to force his resignation.

After Vander Zee's indictment and resignation, the United States Attorney General's Office brought him to trial on

the money laundering charges. The Government prosecuted Vander Zee in the United States District Court of the Western District of Texas before the Honorable Lucious D. Bunton, III. After the Government presented its evidence and rested, Judge Bunton granted Vander Zee's Motion for Acquittal as a matter of law.

Meanwhile, in a related action, the Government filed a verified complaint for forfeiture against the currency Salinas had deposited in the Stone Oak National Bank. Several other actions seeking forfeiture of Salinas' assets followed. The Government then offered to settle all of the forfeiture actions. It is probable that, without a settlement of these claims, the bank would have failed as a financial institution. Thus, pressured by these circumstances, the bank agreed to

the terms of the Government's written settlement agreement. It is primarily the terms in this agreement that aggrieve Vander Zee in this lawsuit.

The settlement agreement, signed approximately six months after Vander Zee's acquittal, required the bank to do the following:

> 1) cease payment of attorney fees and all other financial assistance to Vander Zee, "except for such within the normal and usual course of any other banking customer's business, or unless the Bank becomes legally obligated to do so" (Settlement Agreement at 9-10);
>
> 2) assert that it "had no knowledge of and gave no consent to the **allegedly unlawful money laundering activities performed by...Vander Zee**" [Emphasis added] (Settlement Agreement at 19); and
>
> 3) agree that it would never rehire Vander Zee in any capacity due to **"the poor judgment they exercised in dealing with Mr. Mario Salinas."**

[Emphasis added] (Addendum to Settlement Agreement at 2).

According to Vander Zee, the inclusion of these three provisions has deprived him of liberty and property interests without due process of law in violation of the Fifth Amendment. Specifically, Vander Zee alleges the provisions forced him to permanently lose his position at Stone Oak National Bank and caused irreparable damage to his reputation thereby preventing him from obtaining other employment in the banking industry. Additionally, Vander Zee has filed state tort causes of action against the individually named defendants and the United States under the Federal Tort Claims Act (FTCA). Finally, Vander Zee seeks recovery against the United States under the Administrative Procedure Act (APA).

Discussion

Before addressing the merits of Vander Zee's claims, the Court deems it necessary to examine the conduct of the United States Attorneys in this case. Based on the evidence presented, it appears the U.S. Attorneys acted with disgraceful vengeance in drafting the settlement agreement. After failing to present sufficient evidence of Vander Zee's guilt in the proper forum, the lawyers and the U.S. Attorney's Office evidently sought to punish or denigrate Vander Zee in a forum where he could not participate, the civil forfeiture action involving Salinas' Assets. The Court does not here suggest that, as a provision of the settlement agreement, the Government could not legally demand that the bank

refuse to re-hire Vander Zee. It is the above-cited recitals in the settlement agreement which unnecessarily vilify Vander Zee that are so objectionable. The U.S. Attorneys drafting the settlement agreement know, without question, that these recitals would be filed of record and thereafter publicized. Thus, they knew their actions would likely cause injury to Vander Zee's reputation. Although it is easy to see the U.S. Attorneys' conduct was irresponsible and opprobrious, it is more difficult to determine whether it predicates a colorable cause of action.

* **Claims Under the Administrative Procedure Act**

While Vander Zee's Fifth Amendment and FTCA claims will require a significant amount of discussion, the APA claims are easily discardable. In many cases,

sovereign immunity is waived under the APA and claimants are able to obtain judicial review of federal agency decisions. However, the Act does not permit claimants to obtain judicial review of matters that are committed to the exclusive discretion of the agency. 5 U.S.C.A. § 701(a)(2), *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1339 (9th Cir. 1992). Certainly, the Department of Justice, in its capacity as counsel for the United States, has absolute discretion in fashioning the terms and conditions of a settlement agreement. See *Energy Transportation Group, Inc. v. Skinner*, 752 F.Supp. 1, 13 (D.D.C. 1190) (determining that the Dept., of Justice has sole, unreviewable discretion in deciding whether to settle a case), *aff'd*, 956 F.2d

1206 (D.C.Cir. 1992). Thus, the Department's decision to settle the litigation regarding the forfeiture of Salinas' assets is not reviewable under the APA.

*** Bivens Claims Against Individual Defendants**

Vander Zee's complaint also avers causes of action against Defendants Helen Eversberg[2], Jack C. Frels, Ronald Ederer, Robert Mueller III, and other persons known and unknown in their individual capacities. According to Vander Zee, these persons participated in the drafting of the settlement agreement. Vander Zee claims their inclusion of the above-cited provisions exposes them to individual

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[2] To the Court's knowledge, Defendant Eversberg has yet to receive service. It therefore appears she should be dismissed as a defendant in this case though there has been no 12(b)(5) Motion.

liability for violating his Constitutional rights. These claims are, in effect, *Bivens* claims brought pursuant to 42 U.S.C. §§ 1981[3] and 1983; they allege the individual Defendants violated Vander Zee's Fifth Amendment rights by depriving him of liberty and property interests without due process. *See Bivens v. Seven Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).[4] The other individuals named in the complaint, Janet Reno, Lloyd Bentsen, and Eugene Ludwig, are not susceptible to *Bivens*

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[3] The claims brought under 42 U.S.C. § 1981 can be immediately discounted as Vander Zee has failed to allege any unequal treatment based on race.

[4] Vander Zee's Amended Complaint and briefs also imply relief may be obtained under the Fourteenth Amendment due process protections. The Court rejects this implication, however, as there are no allegations that a State treated Vander Zee unconstitutionally.

claims because they were not sued personally but in their official capacities as employees of the federal government.[5]

Like most defendants in *Bivens* actions, Defendants Frels, Ederer, and Mueller have responded with the affirmative defenses of absolute and qualified immunity. These defendants claim they are entitled to absolute immunity because Vander Zee challenges acts they carried out in their role as counsel for the United States. The Supreme Court has sheltered state and federal prosecutors with absolute immunity when the challenged activity was "intimately associated with

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[5] *Bivens* claims can only be brought against persons as individuals and not against persons in their capacity as employees of a federal agency. *See FDIC v. Meyer*, __ U.S. __, __, 114 S.Ct. 996, 1005 (1994); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1294 n.12 (5th Cir. 1994).

the judicial phase of the criminal process."[6] Imbler v. Pachtman, 424 U.S. 409, 430, 96 S.Ct. 984, 995 (1976). As Vander Zee points out, however, Frels, Ederer, and Mueller were not acting as criminal prosecutors when they drafted the settlement agreement in the Salinas forfeiture action. Realizing this fact, the Government correctly asserts absolute immunity applies in areas outside of criminal prosecution. More specifically, the courts have granted absolute immunity when plaintiffs have challenged the government prosecutor for his or her role

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[6] In the "Memorandum In Support of Defendants Ronald F. Ederer's And Jack C. Frels' Motion to Dismiss," counsel for the Government artfully edited this quotation from *Imbler*. The Government's abridged version reads, "intimately associated with the judicial...process." Memorandum at 8. By omitting the words "phase of the criminal," counsel renders an overbroad construction of *Imbler*.

in a civil forfeiture proceeding. *See, e.g. Schrob v. Catterson*, 948 F.2d 1402, 1411-1413 (3rd Cir. 1991), *Ehrlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990), *Juide v. City of Ann Arbor*, 839 F.Supp. 497, 501-504 (E.D. Mich. 1993).

Despite the Government's contentions, Schrob and the other civil forfeiture cases applying absolute immunity do not sanction its application in this case. Those cases properly determine that without absolute immunity, prosecutors would be reluctant to bring forfeiture actions to confiscate illegally obtained assets. Additionally, the cases note that the defendant in a forfeiture proceeding has "'ample opportunity to challenge the legality of the proceeding'" and thus should not be permitted to do so as a plaintiff in a separate action. *Schrob*,

948 F.2d at 1411 (quoting *Butz v. Economou*, 438 U.S. 478, 516 (1978)). The same rationale does not support an extension of absolute immunity to this case. By denying absolute immunity where prosecutors unnecessarily vilify a third party who is not the defendant in the forfeiture proceeding, the Court will not deter prosecutors' pursuit of illegally obtained assets. Additionally, unlike the plaintiffs in the above-cited cases, Vander Zee had no opportunity to challenge the claims of the government during the forfeiture proceeding; he was completely unaware of the settlement agreement before it was approved by the Court. In view of this analysis and the fact that the Supreme Court has been "quite sparing" in

its recognition of absolute immunity[7], the Court cannot find that Defendants Frels, Ederer, and Mueller are absolutely immune from Vander Zee's *Bivens* claims against them.

In their motion to dismiss, Frels, Ederer, and Mueller also seek refuge in the doctrine of qualified immunity. To successfully invoke this defense, they must show their actions did not violate a clearly established constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This standard commissions the Court to decide whether Frels, Ederer, or Mueller divested Vander Zee of a "liberty" or "property" interest clearly established under the Fifth Amendment.

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[7] *Burns v. Reed*, __ U.S. __, S.Ct. 1934, 1939 (1991).

Before considering whether Vander Zee was deprived of a clearly established constitutional right, the Court should make the threshold determination of whether his claims are colorable *Bivens* claims. *See Samaad v. City of Dallas*, 940 F.2d 925, 940 (5th Cir. 1991). Again, it is important to distinguish the claims brought against the individuals in this suit as *Bivens* claims. Vander Zee, although conceding this point, fails to recognize its significance when asserting and briefing his claims. Consequently, he relies on cases such as *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971). In these cases and others cited by Vander Zee, the plaintiffs brought Fourteenth Amendment claims contesting the

actions of state or municipal entities. Vander Zee has been unable to cite any authority for the proposition that *Bivens* claims arising out of Fifth Amendment due process protections can be brought against individuals for defamation or damage to reputation alone. In fact, the Supreme Court has considered and rejected this type of claim.

In *Siegert v. Gilley*, the Supreme Court considered claims and underlying facts similar to those presently before this Court. *Siegert V. Gilley*, 500 U.S. 226, 111 S.Ct. 1789 (1991). In that case, Siegert's new employer requested a reference from his former employer, a federal hospital from which he had resigned. Siegert's former supervisor sent his new employer a scathing report declaring him incompetent and unethical.

Consequently, Siegert's new employer terminated him. Like Vander Zee, Siegert argued his constitutional claims were not based solely on damage to his reputation. He declared his former supervisor had maliciously deprived him of an existing liberty or property interest in his new employment. The Court rejected this contention because "[t]he alleged defamation was not uttered incident to the termination of Siegert's employment by the hospital, since he voluntarily resigned from his position at the hospital, and the [report] was written several weeks later." *Id.* at 234, 1794. Thus, the court found that the all damage claimed was based exclusively on damage to reputation, including deprivation of future employment opportunities.

Similarly, Vander Zee avers Frels, Ederer, and Mueller, in addition to damaging his reputation, deprived him of an existing liberty and property interest by forcing the bank not to re-hire him. At the time the U.S. Attorneys drafted the settlement agreement, Vander Zee was not employed by the bank. As in *Siegert*, the defamatory statements were not written incident to his termination; he had resigned several weeks before the settlement agreement was drafted. It is also not certain that the bank ever intended to re-hire Vander Zee.[8] Consequently, this Court, like the *Siegert* Court, must find that all the *Bivens* damage claimed by Vander Zee flows, not

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[8] Indeed, Siegert's claim had more substance than Vander Zee's. Unlike Vander Zee, the defamation of Siegert actually caused his termination from an existing job.

from the agreement to prevent his re-hiring, but from the defamatory statements and their injury to his reputation and future employment opportunities.[9]

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[9] If Frels, Ederer, or Mueller had coerced Vander Zee's termination, Vander Zee could have presented a claim that survived a qualified immunity defense. Even when an employee is terminable-at-will, the Government may not interfere with his "right to hold specific private employment and to follow a chosen profession," for this right "comes with the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 79 S.Ct. 1400, 1411 (1959). The terminable-at-will argument only applies when the employer, acting under its own volition, decided to terminate the plaintiff. It does not apply in situations where the Government intervened and forced a private employer to terminate an individual against the employer's will. *See DiMartini v. Ferrin*, 889 F.2d 922, 927-929 (10th Cir. 1989), *opinion amended by* 906 F.2d 465 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2796 (1990). Vander Zee does not allege Frels, Ederer, and Mueller forced his termination; he only alleges they drafted the settlement agreement to prevent his re-hiring.

The *Siegert* Court went on to conclude that when all damage "flows from the injury to [the plaintiff's] reputation, it may be recoverable under state tort law but is not recoverable in a Bivens action." *Id.* at 234, 1794. *Siegert* therefore denies both recovery for damage to reputation and recovery for deprivation of liberty or property interests in future employment opportunities. Even assuming damage to reputation was actionable as a *Bivens* claim, *Siegert* alternatively granted qualified immunity to the defendants on the grounds that there was no clearly established Constitutional protection for damage to reputation alone. Id. In light of *Siegert*, this Court cannot grant recovery for the *Bivens* claims alleging damage to reputation and deprivation of future employment

opportunities. The Court also finds, in the alternative, that the U.S. Attorneys could not have reasonably known that by issuing the defamatory statements they were violating Vander Zee's clearly established constitutional rights. They are therefore protected by qualified immunity.

*** State Law Tort Claims Against Individual Defendants**

Apart from the Bivens claims alleging violations of Constitutional rights, Vander Zee brings several claims sounding in state tort law against the individual defendants. These claims include: intentional and negligent infliction of emotional distress, interference with contractual rights, libel, and slander. According to Vander Zee, he is entitled to relief in light of *Westfall v. Erwin* and

the ensuing Westfall Act.[10] *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580 (1988); Federal Employees Liability Reform and Tort Compensation Act (or "Westfall Act"), Pub. L. #100-694, §§ 5 and 6, 102

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[10] In his Amended Complaint and in his Letter Brief, Vander Zee confounds his federal constitutional claims under Bivens with his claims under the Westfall Act. The Westfall Act clearly encompasses only common law tort claims - not Constitutional tort claims - against individuals. Congress unambiguously stated the purpose of the act is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." 102 Stat. 4564, note following 28 U.S.C. § 2671 (emphasis added). Hence, *Bivens* claims should be considered as entirely distinct from Westfall Act or FTCA claims and the Court has therefore separated the claims in this Order. *See e.g., FDIC v. Meyer, __ U.S. __, 114 S.Ct. 996 (1994)* (concluding that suit by discharged employee predicated on tortious deprivation of Fifth Amendment due process was not "cognizable" under FTCA).

Stat. 564 (1988) (to be codified at 28 U.S.C. § 2679).

In his Amended Complaint and subsequent briefs, Vander Zee implies Congress passed the Westfall Act to ratify or adopt the principle set forth in *Westfall v. Erwin* that "absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope of their official duties *and* the conduct is discretionary in nature." Westfall v. Erwin, 484 U.S. at 297-298, 108 S.Ct. at 584. Contrary to Vander Zee's implications, Congress intended the Westfall Act to reverse the holding in *Westfall* and to bolster absolute immunity for federal employees acting in the scope of their employment. The Act "establishes the absolute immunity for Government

employees that the Court declined to recognize under the common law in *Westfall*." *United States v. Smith*, 499 U.S. 160, 163, 111 S.Ct. 1180, 1183 (1991); *see Lunsford v. Price*, 885 F.2d 236, 237 n. 5 (5th Cir. 1989) (determining the Westfall Act "overrules the distinction *Westfall* drew between 'operational' and 'discretionary' capacities, and creates absolute tort immunity for acts of Federal employees within the course and scope of their employment.")

Further, in passing the Westfall Act, Congress intended to amend or supplement the Federal Tort Claims Act. *United States v. Smith*, 499 U.S. at 163, 111 S.Ct. at 1183. The Westfall Act should be considered within the larger framework of the FTCA. It does not, as Vander Zee

suggests, provide an additional remedy distinct from that available under the FTCA. *See id.* (finding that the Federal Tort Claims Act continues to provide the only common law tort remedy against the United States or its employees acting in the scope of their employment). Under the Westfall Act, when a court finds that the individual defendants were acting in the scope of their employment, they are immunized from liability and the United States is substituted as the defendant under the doctrine of *respondeat superior*. The claims are then treated like all other claims brought against the United States pursuant to the FTCA.[11]

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[11] There are a few exceptions under 28 U.S.C. §§ 2674 and 2679 (d) (the codification of the Westfall Act) that make Westfall Act claims slightly different from other FTCA claims. These exceptions do not, however, exempt Westfall Act claims from the provisions

After reviewing the Amended Complaint and subsequent pleadings, it is certain that the individual defendants Frels, Ederer, and Mueller were acting in the scope of their employment as United States Attorneys when they drafted the settlement agreement. Indeed, The United States Attorney General has filed a Certifications of Attorney General's Designee and Notice of Substitution in this case. These documents certify that Frels, Ederer, and Mueller were acting in the scope of their employment when they drafted the settlement agreement and, accordingly, substitute the United States as the defendant in this case. Section 6 of the Westfall Act specifically permits this type of certification and

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controlling all FTCA claims.

substitution.[12] Thus, applying the Westfall Act, the individual defendants are immune from tort liability and the United States is the sole defendant responsible for their allegedly tortious behavior.

* State Tort Law Claims Against the United States

Vander Zee's complaint avers state law tort claims against Janet Reno, Lloyd Bentsen, and Eugene Ludwig in their respective capacities as Attorney General, Secretary of the Treasury, and Comptroller of the Currency. These claims allege

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[12] Additionally, Vander Zee's complaint does not aver these defendants were acting outside the scope of their employment. In fact, Vander Zee has specifically plead the Westfall Act applies on these facts and, as discussed above, the Act only applies to employees acting within the scope of their employment. If Vander Zee contends Frels, Ederer, and Mueller were not acting in the scope of their employment, he has no federal remedy against them.

intentional and negligent infliction of emotional distress, interference with contract rights, libel, and slander. As with the tort claims against Frels, Ederer, and Mueller, the FTCA applies the doctrine of respondeat superior, immunizing Reno, Bentsen, and Ludwig from liability and substituting the United States as defendant. *See Hafer v. Melo*, __ U.S. __, __, 112 S.Ct. 358, 361-62 (1991), *Burzynski Cancer Research Institute*, 819 F.2d 1301, 1306 (5th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988). Thus, the United States has been substituted as defendant for all state tort claims in this suit and Vander Zee may recover on those claims to the extent permitted under the FTCA.[13]

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[13] Under certain circumstances and with particular tort claims the FTCA provides a waiver of the United States'

For two reasons, Vander Zee's state tort claims in this action must fail: the Court does not have subject matter jurisdiction to hear the claims due to Vander Zee's failure to comply with 28 U.S.C. § 2675 and the FTCA expressly bars two of his tort claims under 28 U.S.C. § 2680(h). First, under U.S.C. § 2675, a claimant must file his or her complaint with the appropriate federal agency before filing an action against the United States based on the tortious conduct of a government employee. The agency then has six months to consider the claims and grant relief or issue a written final denial. If after six months the agency has failed to deny the claims, they are

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sovereign immunity, but "[a]bsent a waiver, sovereign immunity shields the United States and its agencies from suit." *FDIC v. Meyer*, __ U.S. __, __, 114 S.Ct. 996, 1000 (1994),

presumed denied and the claimant may file suit. The federal courts have no subject matter jurisdiction to hear claims brought under the FTCA (or the Westfall Act) unless the claimant proves compliance with the requirements of 28 U.S.C. § 2675. *Cook v. U.S. on Behalf of U.S. Dep't of Labor*, 978 F.2d 164 (5th Cir. 1992); *Reynolds v. U.S.*, 748 F.2d 291 (5th Cir. 1984); *See Sullivan v. U.S., supra* (finding that the Court has not subject matter jurisdiction over a Westfall plaintiff who failed to comply with 28 U.S.C. § 2675).

Vander Zee proffers no evidence showing satisfaction of the prerequisites of 28 U.S.C. 2675. He filed this lawsuit in August of 1993 and filed a complaint with the Department of Justice two months later. The fact that the complaint filed with the Department of Justice has now

been finally denied does not cure the jurisdictional defect. McNeil v. United States, __ U.S. __, __, 113 S.Ct. 1980, 1983 (1993). The Court must therefore grant the United States' Motion to dismiss, filed pursuant to Fed. R. Civ. P. 12(b)(1), and dismiss all claims brought under the FTCA.

Second, even if the Court has subject matter jurisdiction over Vander Zee's tort claims, his specific claims alleging defamation and interference with contract do not overcome the sovereign immunity reserved by 28 U.S.C. § 2680(h). Those claims must therefore be dismissed under that statute. See Mitchell v. Carlson, 896 F.2d 128, 134 (5th Cir. 1990) (dismissing claims for assault and battery due to lack of subject matter jurisdiction over the claims under 28 U.S.C. § 2860(h)); Aviles

v. Lutz, 887 F.2d 1046 (10th Cir. 1989) (dismissing claims for defamation and interference with contractual rights due to lack of subject matter jurisdiction under 28 U.S.C. § 2860(h)).

Therefore, for the reasons explained above, the Court enters the following orders:

IT IS ORDERED that the Motions to Dismiss of Defendants Frels, Ederer, and Mueller are GRANTED, and all claims against Jack C. Frels, Ronald Ederer, and Robert Mueller III are DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).

IT IS ORDERED that the United States Motion to Dismiss is GRANTED; all claims against the United States under the FTCA (including the Westfall Act claims) and APA are DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

IT IS ORDERED that all claims against Helen Eversberg are DISMISSED as the Court has granted the United States' Motion to Dismiss which was filed on her behalf and the Amended Complaint alleges no Bivens claims against her personally; additionally, Plaintiff has failed to perfect service upon her within the ninety days allotted by the Court.

SIGNED this 6th day of June, 1994.

SAM SPARKS

UNITED STATES DISTRICT JUDGE